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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1922.

No. 307

UNITED STATES OF AMERICA,
Appellant,

vs.

AMERICAN LINSEED OIL COMPANY, et al.,

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

Motion of Wm. J. Matthews for Leave to file a Brief as Amicus Curiae and Petition Accompanying the Motion.

WM. J. MATTHEWS,
HUGH T. MARTIN,
as Amici Curiae.

CHAMPLIN LAW PRINTING CO., CHICAGO

IN THE

Supreme Court of the United States

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Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

MOTION.

Now comes William J. Matthews, a member of the bar of this court, and presents the annexed petition, and asks leave to file herein a brief as *amici curiae*. The reasons in support of this motion are stated in the petition.

.....

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UNITED STATES OF AMERICA,
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Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

PETITION.

The petition of the undersigned respectfully represents to the court as follows:

This case involves the right of competing business men to co-operatively, through a central Bureau, assemble and distribute certain statistical data concerning production, consumption and prices, among some other activities, and whether the same as conducted by the Bureau, in this case, is in violation of the Sherman Act.

The decision of the District Court approved such activities of this Bureau as conducted for the defendants, and an appeal from that decision to this court has been taken by the United States Government.

. . . . . .

Your petitioner is attorney for clients who are in some instances participating in some of the co-operative activities of collecting and distributing statistics by and among the members of their industry and to various departments of the United States Government, some of which statistics are similar to those involved in this case, and consequently the decision in this case might have an important bearing upon the rights and liabilities of his clients.

Your petitioner also represents that he, collaborating with Hugh T. Martin, of Chicago, and a member of the Illinois Bar, filed a brief as *amici curiae* in this case in the District Court when it was tried in that court. That the principles are set forth in that *amici curiae* brief are included in the brief which your petitioner desires to file in this court.

Your petitioner and Mr. Martin have given the record in this case, and the legal and economic principles involved, special study, and have endeavored to present the same to this court in an orderly manner. That many of the principles involved are practically of first impression in this court, and there is urgent need for a decision clearly defining rules of business conduct in these matters.

Being thus directly interested in the decision of many of the questions herein involved, your petitioner desires the privilege of presenting a brief, which has been prepared by Mr. Martin and your petitioner after exhaustive study, as *amici curiae*. Your petitioner accordingly respectfully requests that an appropriate order for that purpose be entered.

Respectfully submitted,

.....

State of Illinois,
County of Cook. } ss.

William J. Matthews, of said county, being duly sworn, says: I have the foregoing petition and the same is true.

.....

Subscribed and sworn to before me this ..... day of April, 1923.

.....

Notary Public of Cook County, Illinois.

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1922.

UNITED STATES OF AMERICA, APPELLANT,
v.
AMERICAN LINSEED OIL COMPANY ET AL. } No. 307.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF ON BEHALF OF THE UNITED STATES.

STATEMENT OF THE CASE.

This action was brought by the United States against the Armstrong Bureau of Related Industries and the manufacturers of linseed oil who are members of that bureau. According to the allegations of the bill the Armstrong Bureau is a partnership composed of Julian Armstrong and Montagu Ferry (R. 2), but it appears from the answer of the Bureau that the proprietor is Julian Armstrong alone. It is alleged in substance in the bill that a written contract, identical as to each, was entered into by said Bureau and the several defendant manufacturers whereby the Bureau was to be in effect a clearing-house

through which the manufacturers were to lay bare to each other the minutest details of their business, and they were also to organize themselves into a council, which was required to hold monthly meetings for the discussion of the various features of the industry of manufacturing and selling linseed oil; that the plan had been put into effect in 1918 and was still in operation, and that its enforcement had resulted in the restraint of interstate trade and commerce in linseed oil. The details of the plan and the activities of the defendants thereunder are stated in full in the bill (R. 1–11), but are not here repeated, as they will appear in the recital of the evidence.

Some of the defendants answered jointly and others separately, but they all in effect admitted the plan and the organization thereunder, but denied that interstate commerce had been restrained thereby (R. 11–40).

District Judge Carpenter, before whom the case was tried, handed down an opinion on November 1, 1921, a month and a half before this Court's opinion was rendered in the case of *American Column & Lumber Company* v. *United States*, known as the *Hardwood case;* and the court held that the combination created by the contracts between the Bureau and its members and the activities thereunder were not unlawful, and the bill was therefore dismissed (R. 42–49); and an appeal was prosecuted direct to this Court.

ASSIGNMENT OF ERRORS.

An assignment of errors was filed in the court below, in which it was insisted that the court erred:

(1) In failing to adjudge and decree that defendants had agreed, combined and conspired to restrain, and were when the bill was filed engaging in a combination and conspiracy in restraint of, interstate trade and commerce in linseed oil, in violation of the Anti-Trust Act:

(2) In failing to hold that defendants had agreed, combined and conspired, and were engaging in a combination and conspiracy, *to suppress competition in prices amongst themselves* in making sales of linseed oil for transportation in interstate and foreign commerce;

(3) In failing to hold that defendants had agreed, combined and conspired, and were engaging in a combination and conspiracy, *to enhance the prices at which linseed oil was sold for shipment and was shipped* in interstate and foreign commerce;

(4) In failing to hold that defendants had agreed, combined and conspired, and were engaging in a combination and conspiracy, *to retard the lowering of prices of linseed oil sold for shipment, and shipped* in interstate and foreign commerce;

(5) In holding that a combination and conspiracy did not exist between the defendants to restrain interstate and foreign trade and commerce in linseed oil *by suppressing competition in the prices of such oil amongst the defendant manufacturers and by enhancing the prices and also by retarding the reduction of*

the prices of such oil, by the methods described in the original bill;

(6) In failing to enjoin the defendants from further carrying out the combination created by the contracts between the Bureau and its members (R. 153, 154).

THE EVIDENCE.

As the Government relies both upon the contracts between the Bureau and its subscribers and upon circumstantial evidence to show the purposes of the plan and the necessary result of its operation, a full citation of and copious quotations from the evidence are deemed advisable, as it will thus be presented concisely and in an orderly way, and not in fragments, as would be the case if merely cited or a very general statement made of its substance, and the record had to be searched to ascertain its exact character.

The Armstrong Bureau served different lines of industry, but this action calls in question only the plan and activities thereunder which relate to the manufacture and sale of linseed oil.

THE CONTRACT BETWEEN THE BUREAU AND ITS SEVERAL SUBSCRIBERS.

The Government filed as Exhibits 1a and 1b two specimen contracts between the Bureau and the defendant members, one of which is dated October 1, 1918, and the other October 1, 1919. While not identical in language, yet there is no essential difference between the two; and that the Court may understand the exact scope and nature of the plan operated by the defendants the contract of the latter date is here set forth in full.

(Those parts regarded as specially important are emphasized. All italics in the brief are ours unless otherwise designated.)

> Armstrong Bureau of Related Industries, whose products manufactured, marketed, and sold in strict accord with a spirit of fairness to employee, competitor, and purchaser need no greater surety of supreme quality."
>
> *It is understood and agreed as specifically set forth in this contract that the matter contained herein is for the exclusive and confidential use of the subscriber named above, and upon termination of this contract or revised printing of the same this copy is to be returned to the Armstrong Bureau of Related Industries,* 11 La Salle Street South, Chicago, Ill.
>
> SUBSCRIPTION AGREEMENT FOR SPECIAL STATISTICAL SERVICE WITH THE ARMSTRONG BUREAU OF RELATED INDUSTRIES TO BE FURNISHED TO THE CRUSHERS OF FLAXSEED OF THE UNITED STATES OF AMERICA.
>
> Whereas it is desired by the undersigned and other crushers of flaxseed (hereinafter designated as "subscribers" and referred to by the pronoun as herein used) to promptly and economically secure for themselves from and through the undersigned Armstrong Bureau of Related Industries, of Chicago (hereinafter designated as the "bureau"):
>
> (*a*) Comprehensive and reliable data and information as to market, trade, and manufacturing conditions in the linseed oil, cake, and meal industry of the United States and export fields;

(*b*) Economies in manufacture and sale to be effected by the frank exchange of true and accurate information pertaining thereto;

(*c*) The latest authentic information as to the credit standing of purchasers of their product;

(*d*) A broader market for cake and meal to the farmer and stock raiser by pointing out to them through educational campaigns the food and fertilizing values of the foregoing and also by cooperating with the U. S. Department of Agriculture to the same end;

(*e*) The establishment of uniform cost accounting systems throughout the industry;

(*f*) Also to at all times obtain, by cooperation with freight tariff boards, fair and just freight tariffs and classifications;

(*g*) And to establish and maintain definite standardizations of the products of the industry;

(*h*) To effect economies in the development of foreign markets and increase such sales;

(*i*) And, in so far as it may be lawful, to effect the stabilization of the flaxseed market and eliminate the speculative features therein;

(*j*) And by cooperation to secure shipment of cake and meal to the consumer from the nearest point of production, thereby saving the loss incident to long and cross transportation;

All of which will promote better and more safe, sane, and stable conditions in the linseed oil, cake, and meal industry and increase its service to the commonwealth.

Now, therefore, in consideration of the benefits that will accrue individually and collectively by and to each "subscriber" and the parties hereto and of the promises and agreements herein made and other valuable considerations each to the other in hand paid, receipt of which is hereby acknowledged, the undersigned have and do hereby mutually agree as herein set forth and the undersigned "subscriber" does hereby subscribe to the service of said "bureau," as herein specified, for a period of one (1) year from the first day of October, 1919, or any then remaining portion of such period, *and this contract shall stand renewed from year to year (dating from October first) unless previously canceled as herein provided.*

It shall be and is expressly understood and agreed, by each "subscriber" hereto, that all information reported to said "bureau" or distributed by it is and shall, at all times, be purely statistical and pertains and will pertain only to past operations and that no part of the machinery of said "bureau" will be permitted to be used to fix prices for the sale of linseed oil, cake, or meal, or any other product, or to divide the territory, limit the sale, production, or manufacture thereof or to control competition.

Each "subscriber" hereto recognizes that the efficiency of the "bureau" and the value of the information secured, collected, and distributed by it and the benefits to be derived therefrom are dependent upon the accuracy, punctuality, and completeness of reports and

information received from its "subscribers"; therefore each "subscriber" to this contract hereby further agrees, for itself and all those whom it can lawfully control:

To promptly make, have made, forward, and have sent in and to said "bureau," as and in the form required by this agreement, full, accurate, complete, signed, and certified reports of all said sales, quotations, and offerings or other information required by the "bureau" and full, correct replies or answers to any and all inquiries concerning the same or seeking any information in regard thereto; and

On request at once turn and have turned over to the "bureau's" auditor for examination all vouchers, books of account, correspondence, and such other evidence or documents as he may request or, in lieu of the same or any part thereof, such abstracts therefrom as he may designate, verified under oath and certified by a certified public accountant in good standing.

If any "subscriber" considers that it has good cause to question the report made by any other "subscriber" then it may request an investigation or audit to be made by the "bureau" and, if considered proper by the "bureau," it will be so made. All expenses incident to any investigation shall be paid by the "subscriber" or "subscribers" found in error as the result of such investigation and in no event by the "bureau."

BOND DEPOSIT.—The undersigned and each "subscriber" to these agreements, upon the execution and delivery thereof, has and does deposit with said "bureau" Liberty bonds in an

amount computed at the rate of $1,000, par value, for each six presses or fractions thereof by it operated, at the time of the execution hereof, in its various mills: Provided, however, the amount of such deposits shall be not less than $1,000 nor in excess of $10,000; and at the close of each contract year the amount of this bond deposit shall be so readjusted on the same basis.

At the first meeting of the "subscribers" hereto they shall select, by a majority vote, two of their members to act with the representative of said "bureau" as a "bond committee," which committee shall at once select a suitable safety deposit vault and deposit therein all bonds so deposited with said "bureau," and access to said vault and deposited bonds therein shall be had only by said bureau's representative jointly with at least one other of said "committee" the members of which may be from time to time changed by vote of the "subscribers" and the bureau's representative may be likewise changed by it.

Should the undersigned "subscriber" fail, in any manner whatsoever, to comply with any of the terms of this agreement or with any and all reasonable requirements of said "bureau," then it shall and does hereby forfeit to said "bureau," at its election, all money paid for services and all further benefits and rights under this agreement; which forfeiture, for just cause, may be declared by said "bureau," evidenced by written notice thereof mailed to said offender by U. S. registered mail, and such "subscriber" shall thereby forfeit all further right, title, or interest in and to

said bonds (so on deposit) in whole or in part, and such action shall be subject to revision only by the "appellate council" as in this contract provided; that is:

Upon such forfeiture being so declared, any "subscriber" (upon giving notice to the "bureau" by U. S. registered mail within twenty days after the mailing of the above forfeiture notice by the "bureau") shall have the right of appeal therefrom to an "appellate council" consisting of three representatives to be chosen from among the other "subscribers" to this agreement; to be selected and become operative in the following manner, that is:

Upon receiving such notice of appeal, a box containing the names of all "subscribers" hereto, excepting, of course, such offender (each name on a separate card) shall be at once prepared and within ten days thereafter three names shall be drawn from this box by the "chairman" then in office or one of the officers elected by the "subscribers" at their regular meetings as herein provided, which names so drawn from this box shall compose this "appellate council," and the name first drawn shall act as "chairman"; and, should any person so chosen, for any cause, not serve his successor shall be chosen in like manner; and

Such "appellate council" shall be at once convened by the chairman and to which shall at once be given all the findings of the "bureau," and "council" shall promptly review the entire matter in any manner it considers appropriate and pass final judgment which

shall be expressed by a majority vote and shall be final and binding and *from which there shall be no further appeal or other redress or resort to law or otherwise and in so doing said "appellate council" may:*

(a) Reinstate such "subscriber" to the service of the "bureau" or take any other action that it sees fit, excepting that any fine levied by such "council" shall not exceed the amount of that "subscriber's" said deposit with the "bureau"; and

(b) Determine the expenses incurred and loss sustained by said "bureau" occasioned by said breach of contract; and

(c) The expenses of calling, convening, and the operations of such "council" and its members in its work, and any other expenses occasioned the parties in interest incident to said breach; and

(d) Render its final judgment and in so doing may direct said "committee" to make sale of sufficient of said bonds, so deposited by said "subscriber," to repay the sums above specified and which shall be at once done by the "committee," and

(e) As a further penalty all or any part or portion of the remainder of said bonds may be turned over to the Red Cross or some other national charity selected by majority vote of the "subscribers" as in its arbitrary judgment it may direct.

(f) It may return the remainder, if any, of said bonds to the depositing "subscriber," in which event such "subscriber" shall then and there and at that time (if reinstated) make a

further deposit with said "bureau" of other Liberty bonds, which together with said remainder to be then redeposited shall amount to the original deposit.

Said bonds so deposited with said "bureau" shall be (until otherwise disposed of as herein provided) so held in trust, and all interest collected or paid while thus in custody shall be promptly accounted for and paid over to the respective parties in interest, and all bonds remaining at the termination of this contract and not previously disposed of as herein provided shall be surrendered and turned back to the respective "subscriber" without further charge in the premises.

SERVICE CHARGE.—The undersigned "subscriber" hereby further agrees to pay to said "bureau" for each year's statistical service a total sum computed on the number of bushels of flaxseed milled by such "subscriber" during the preceding twelve (12) months, estimated and arrived at in the following manner; that is:

(*a*) For the first 100,000 bushels it shall pay a charge of eight dollars ($8.00) per thousand for each one thousand bushels or fraction thereof;

(*b*) For the second 100,000 bushels it shall pay a charge of four dollars ($4.00) per thousand for each one thousand bushels or fraction thereof;

(*c*) For the third 100,000 bushels it shall pay a charge of two dollars ($2.00) per thousand for each one thousand bushels or fraction thereof;

(*d*) For all amounts over and above 300,000 bushels it shall pay a charge of one dollar ($1.00) per one thousand bushels or fraction thereof;

The total sum thus computed shall be divided into four equal parts and shall be by the undersigned "subscriber" paid "one part" each quarter in advance, the first payment to be made upon the ensealing and delivery of this contract. At the close of each year of this contract this annual charge shall be recomputed at the same rate but on the basis of the last contract year's milling of flaxseed by the undersigned, but in no event (regardless of any such computation) shall the fees thus paid by the undersigned "subscriber" for any fiscal year amount to less than eleven hundred dollars ($1100).

CANCELLATION OF CONTRACT.—Any "subscriber," in good standing, by giving written notice to the "bureau" by U. S. registered mail of its desire so to do, may have this agreement canceled and service discontinued thirty days after the date of mailing such notice, and the "bureau" may also cancel the same at any time under the same conditions and in similar manner.

SERVICE OF THE BUREAU.—With the help of each and every "subscriber" to this agreement which each signing this agreement hereby agrees to give, the "bureau" agrees:

(*a*) To undertake and use its best efforts to organize hereunder and for the purpose hereof the linseed oil, cake and meal industry of the United States; and

(*b*) To at once afford the "subscriber" the full statistical service of the "bureau" for the exchange of the following statistical information:

(aa) Quotations; (bb) sales; (cc) shipments; (dd) production; (ee) terms; and

(*c*) To afford the industry the service of its credit reporting department and, by a careful study of the marketing and distributing problems of the industry, to suggest, from time to time, the method and means for broader service.

When the industry shall require additional service other than that so specifically covered in the above paragraphs "a," "b" and "c," it shall be supplied by the "bureau" at a special additional rate to be then determined.

MEETINGS.—It is agreed:

(*a*) *Monthly meetings will be held of all subscribers hereto at some convenient center;*

(*b*) Due notice of said meetings will be sent out by the "bureau" to each "subscriber" hereto two weeks in advance of the meeting date;

(*c*) At these meetings said "subscribers" shall annually choose their chairman and such other officers as desired, but some representative of the "bureau" shall at all times act as secretary and *shall present to the meeting any and all matters pertaining to the linseed oil, cake and meal industry to be therein openly discussed for the benefit of the industry and the public welfare;*

(*d*) *"Subscribers" may send in to the "bureau" notice of such matters or topics as they may*

wish to have discussed at these meetings and if such matters are in accord with the spirit and letter of this agreement and the object of the service, then the "bureau" shall cause the same to be properly docketed and presented to the meeting;

(*e*) *All "subscribers" shall report at these meetings on all matters and conditions within their knowledge affecting the industry and within the limits of this agreement that they may be there discussed for mutual benefit;*

(*f*) When questions arise as to incurring financial obligations not provided for and subscribed to in this contract, the same shall be decided by a two-thirds majority vote of all "subscribers" hereto by special ballot as follows:

(*g*) *Each "subscriber" present shall have one vote for each thousand bushels of flaxseed which is the basis for computing that "subscriber's" current year's service fee to the "bureau";*

(*h*) *There shall be no quorum present at any meeting of "subscribers" for the transaction of business other than to adjourn unless there are sufficient present to represent two-thirds of the votes of all of the "subscribers" on the basis as determined in the preceding paragraph.*

Any member of a partnership, which is a "subscriber" hereto, or any agent of a corporation, which is such "subscriber," appointed by resolution of its board of directors and presenting a certified copy thereof, may act in behalf of said "subscriber" in all matters pertaining to this contract and the undersigned "subscribers" agrees to be fully bound thereby.

Any "subscriber" failing to attend in person or by said representative at each of these meetings and be in punctual and continued attendance thereon shall be subject to a fine of twenty-five dollars ($25.00) for each offense, the same to be collected by and payable to the "bureau." This fine may be remitted by a majority vote of the members present at the meeting where it is incurred.

STATISTICAL SERVICE.—The statistical service so to be furnished by the "bureau" shall be accomplished and provided by the use of special reporting forms conveying information on past transactions as outlined herein and which may be modified, changed, and others provided as experience suggests or as called for by the "subscribers" in any of their meetings and approved by the "bureau."

DAILY MARKET INFORMATION.—The undersigned and each "subscriber" hereto agrees:

(a) To immediately, and when and as hereafter issued, deposit with the "bureau" all published price lists of the undersigned covering raw and boiled linseed oil, cake and meal;

(b) Also to report to the "bureau" by prepaid telegraph, and further confirm by mail, duplicate of all quotations made at variance with above price lists, giving better terms to the contemplated purchaser than those quoted;

(c) With all reports made in compliance with the above paragraph "b" of quotations which amount to one carload or more of oil, cake or meal there shall also be reported at the same time and in the same manner the prospective buyer's name, address, and f. o. b. point of shipment;

(*d*) *In so far as the above reports "a," "b" and "c" do not disclose the following, the undersigned "subscriber" agrees to give the following information in connection therewith, that is: the exact prices, terms, and discounts—and whether made to jobber, dealer, or consumer—and in what quantities, carload or less than carload, and warehouse or mill prices;*

(*e*) *Also to promptly report all changes in and alterations or withdrawals of the above, of every kind whatsoever, that may be made;*

(*f*) *Also to promptly report by prepaid telegraph, and further confirm by mail, all orders received by the undersigned "subscriber" in response to special quotations made as above provided in paragraph "c", designating the quotation which is the basis of such order and any variance therefrom.*

REPORTS OF SALES:

(*a*) *DAILY SALES REPORT.—Directly at the close of each day's business each "subscriber" shall mail by special delivery to the "bureau" a complete report of all its carload sales for that day of oil, cake or meal, not covered by its previous daily sales reports, which report shall disclose the quantity and kind, price and terms, and whether for immediate or future delivery, and if no sale has been so made, this fact shall be likewise reported.*

(*b*) *WEEKLY SALES REPORT.—For the purpose of compiling this report a map of the United States shall be divided into zones as agreed upon by all of the "subscribers" to this service, and each "subscriber" at the conclusion of the*

week shall send to the "bureau" by special delivery, not later than the following Monday night, a compiled report of all of its sales of oil, cake or meal into each zone made during the period covered by such report and not previously so reported, specifically setting forth the following:

(a–a) Total gallons of oil sold into each zone, also showing the total gallons and price per gallon received for such oil sold.

(b–b) Total tonnage of cake and meal sold into each zone, also showing total weight and price received per ton for such cake or meal sold.

(c–c) Sales reports on both oil, cake and meal shall differentiate spot and future delivery, giving period of such futures.

REPORT OF STOCK ON HAND.—The undersigned agrees on or before the 10th day of each calendar month to report to the "bureau":

(a) The number of gallons of oil on hand not covered by sale or contract.

(b) The total tons of meal or cake on hand not covered by sale or contract.

ALL OF THE FOREGOING MARKET INFORMATION AS RECEIVED BY THE "BUREAU" WILL BE PROMPTLY CLEARED AND RELAYED BY IT TO THE UNDERSIGNED "SUBSCRIBER" AND TO ALL OTHER "SUBSCRIBERS" IN GOOD STANDING.

SPECIAL MARKET INFORMATION.—ANY "SUBSCRIBER" WHO HAS MADE OFFERINGS OR QUOTATIONS TO A PROSPECTIVE BUYER AND IS ADVISED BY SUCH BUYER THAT IT IS NOT TO BE AWARDED SUCH BUSINESS SHALL

HAVE THE RIGHT TO IMMEDIATELY ADVISE THE "BUREAU" OF SUCH UNSUCCESSFUL OFFERING OR QUOTATION GIVING ALL DETAILS OF SUCH BID OR OFFERING, AND MAY THEN REQUEST THE "BUREAU" TO BULLETIN ALL OF ITS "SUBSCRIBERS" ASKING SPECIFIC INFORMATION REGARDING ANY QUOTATION OR SALE TO SUCH PROSPECTIVE BUYER BY ANY OF THE OTHER "SUBSCRIBERS" AND THE "BUREAU," ON RECEIPT OF SUCH REQUEST, WILL IMMEDIATELY BULLETIN ALL "SUBSCRIBERS" ASKING THEREFOR AND ON RECEIPT OF REPLIES WILL SEND OUT A COMPILATION REPORT THEREOF TO ALL "SUBSCRIBERS," TOGETHER WITH THE DETAILS OF SALE, IF SUCH A SALE HAS BEEN REPORTED, SO THAT ALL "SUBSCRIBERS," INCLUDING THE ORIGINAL INQUIRER, WILL HAVE A COMPLETE REPORT OF THIS TRANSACTION.

ON RECEIPT OF A REQUEST FOR SUCH SPECIFIC INFORMATION FROM THE "BUREAU," THE UNDERSIGNED "SUBSCRIBER" WILL IMMEDIATELY REPLY TO SAME GIVING FULL INFORMATION AS TO ANY QUOTATION OR SALE WHICH IT MAY HAVE MADE TO SUCH A BUYER AND, IF IT HAS MADE NONE, SO REPORT.

GENERAL MARKET INFORMATION.—The "bureau" will send to its "sub-

scribers" in the form of market letters "news clippings" of interest to the industry which may be gathered by the "bureau" or which may be submitted by the "subscribers" as being of interest to the industry; providing, however, that all such information to be so distributed is in accordance with the object and terms of this agreement.

MARKET INFORMATION ON SPECIAL OILS NOT OF GENERAL INTEREST TO THE INDUSTRY.—"Subscribers" manufacturing and selling so-called "special oils" in competition with a limited number of the "subscribers" to this service may exchange through the "bureau" quotations, sales, or offerings on such oils which information will be mailed as herein provided, but on an exchange basis only, i. e., like information for like information, and to the extent to be hereafter determined by the "bureau."

CREDIT INFORMATION.—It is agreed that each "subscriber" will give to the "bureau" on receipt of a request for such information, any and all information which it may have pertaining to any buyer of linseed oil, cake, and meal and each "subscriber" may in turn request the "bureau" to secure such credit information from all "subscribers," provided that in making such a request it shall have an order or an account with, or an inquiry from, the company or individual on whom such information is desired, and this information thus obtained will be promptly relayed to all "subscribers" interested.

For the transmission and handling of such credit information the "bureau's" regular standard forms will be provided and used.

It is expressly understood that all reasonable modifications or changes in the foregoing requirements as to reports and the relaying of such affecting alike all "subscribers" may be from time to time made by the "bureau" and its instructions shall be followed, and that no "subscriber" has or hereby assumes any responsibility of any name, nature, description and kind whatsoever for any act or failure to act on the part of the "bureau" or any other "subscriber" hereto.

And it is further understood and agreed by the undersigned "subscriber" that all information received by it from the "bureau" or any of the meetings of its "subscribers" will be treated in complete confidence by it and will not be disclosed to any person whomsoever, except to other like "subscribers" and to those lawfully entitled thereto, and the contents of this contract will be treated in like manner by it, and on the termination hereof this document will be surrendered to said "bureau."

RELATIVE AMOUNT OF THE TOTAL BUSINESS DONE BY DEFENDANTS.

It is alleged in the original bill that the defendant manufacturers are nearly all of the most important producers of linseed oil in the United States (R. 2). This is denied in the answers (R. 12, 26, 33). But that the allegation is true is shown by Mairs, of the Archer-Daniel Company, who mentions the names

of the manufacturers in Minneapolis (R. 79), and by Quine, of the American Company, who mentions the companies operating at Buffalo and New York (R. 121), at which three points the greatest amount of the crushing is done (R. 70). All of the mills mentioned were subscribers to the Bureau.

Furthermore, the same fact more conclusively appears from Government's Exhibit 8 (R. 258–268), which shows the production and consumption by pounds of linseed oil and other fats and oils, and Exhibit 9 (R. 269–311), which shows by gallons the sales of linseed oil made by the defendant manufacturers.

For illustration: In the first quarter of 1919 the amount of oil produced was 88,704,568 pounds (R. 258). For the same quarter the amount of oil sold by defendant manufacturers was 8,110,714 gallons, or, as a gallon of oil weighs 7½ pounds (R. 71), 60,830,355 pounds. This is ascertained by adding up the weekly sales by defendants in the several zones, not including the sales to each other. They therefore sold a quantity amounting to 68½ per cent of the total production. And during the third quarter they sold 100,307,815 pounds, and there was produced 129,221,965 pounds, or the quantity they sold was equivalent to 77.6 per cent of the total production. In fact, during the second quarter defendants sold more oil than the quantity produced.

The Government insists that, when the relative magnitude of the business done by the defendants is taken into consideration, the carrying into effect of the terms of the contract between each of them and

the Bureau necessarily resulted in the restraint of interstate commerce in linseed oil; and, therefore, that its case was made out when the form of those contracts was filed, and it was proven that defendants were operating thereunder. However, it went further and showed by the evidence hereinafter cited the activities actually engaged in by defendants, and their effect upon the prices of oil and the practices incident to the trade therein.

DIVISION OF TERRITORY INTO ZONES.

It is alleged in the bill that the defendants agreed that the United States should be divided into eight zones, and that the prices established for zone 1 should be designated as base prices, and that prices in zone 2 should be one cent, in zone 3 two cents, in zone 4 four cents, in zone 5 six cents, in zone 6 seven cents, in zone 7 eight cents, and in zone 8 eleven cents, per gallon higher than said base prices; that in reporting, the amount of sales and prices therefor should be reported for each zone separately; and that these zones and prices for the several zones were adopted in order that the general plan to control production and prices might be more conveniently and successfully carried out (R. 4); and the territory embraced in each of the several zones was shown by a map filed as Exhibit B to the original bill.

In the answer filed by the Armstrong Bureau and eight of the manufacturers it was admitted that for the purpose of their operations and for no other purpose, and pursuant to the terms of the contracts

between the Bureau and the several members, they did divide the United States into zones as set forth in the said map filed as Exhibit B to the original bill; but they alleged that the differences in prices in the various zones as set forth in the bill represent only actual cash disbursements, to wit, freight rates in the transportation of commodities, and were recommended after careful research and examination of the established railroad rates throughout the United States for the purpose of intelligently reporting under the provisions of their contracts, and that they were not to be used to control or affect, nor did they in fact control or affect, the prices of the commodity charged by any of the defendant manufacturers or paid by any consumer; and that the dividing of the United States into zones has for many years been common practice in other industries (R. 15–16).

Similar admissions and allegations appear in the answers of William O. Goodrich (R. 23), and of the National Lead Company (R. 29–30), and of the American Linseed Oil Company (R. 36–37). The map filed as Exhibit B appears on page 253 of the record, and shows what parts of the United States belong to each zone. It also shows that all of Canada is classified as zone 9.

The contract between the bureau and each subscriber provided that for the purpose of compiling the weekly sales report the United States should be divided into zones as agreed upon by all of the subscribers, and that each subscriber should show in its report the amount of its sales in each zone (R. 176).

But that the system was used also for purposes other than reporting will appear from the following facts.

The minutes of the first meeting of the members of the Bureau, on September 17, 1919, show that the following discussion and understanding was had with reference to zones:

> There was then a general discussion on the matter of zones, or market areas in which subscribers should report to the bureau their various quotations and sales, and various suggestions for the use of Minneapolis and New York as basing points were considered. The matter was finally settled by motion from Mr. Warner that the bureau make a map, with the cooperation of such subscribers as may be necessary, showing various zones to cover the exchange of market information, and that copy of such map, when completed, be mailed to each subscriber who shall then, at once, file his quotations and reports for each zone shown, and in accordance with the provisions of the service contract. Carried.
>
> Further discussion of the zone matter by Messrs. Nolan, Bolton, Hirst, Adams, Kellogg, and Warner developed the suggestion that New York, Buffalo, Toledo, Chicago, Minneapolis, and Des Moines as manufacturing points are logical zone centers.
>
> Mr. Armstrong stated that as soon as the filing of all price lists was completed the exchange would be made and the service launched.
>
> It was moved by Mr. Warner, and seconded by Mr. Archer, that upon receipt of zone map

> from the bureau each subscriber shall immediately file prices in each zone as last quoted by him. Further, that each subscriber shall so state where he is not active in any zone and that such quotation report or "price lists" shall [be] by each mailed to the bureau not later than three days after the receipt of the map. Carried.
>
> It was the sense of the meeting that these zones may have to be changed from time to time but that this was the most practical method of making a start in the matter of identifying and exchanging market information (R. 667).

At the meeting of October 14, 1918, the minutes show that the subject of market zones was again taken up; that a large map showing ten zones as tentatively laid out by the Bureau was placed before the meeting, that a discussion was had as to the effect of the various freight differentials on shipments to the Pacific coast, and that it was the sense of the meeting that oil for Pacific coast trade be sold on basis of Minneapolis tank car prices with charge on barrel basis on delivered prices; and that there were suggestions as to the zones to which certain points should be assigned, and that the several zones as then modified were approved (R. 669, 670).

At the meeting of November 13, 1918 the minutes show the following action with reference to zones:

> The matter of revisions in the freight zone map was then taken up as it was evident that changes were in order because of some por-

tions in these zones being greatly affected by water rates.

Suggestions for such revisions, as made by two of the subscribers, were set forth by colored lines upon a large map and it was clearly shown that the Southern Atlantic and Gulf Port States, favored by water rates from New York, required additional zoning and Spencer Kellogg's proposed zone four covering this territory was a logical addition.

It was further shown that the cities of Richmond and Norfolk, Va., by reason of their nearness to the line of zone three, were logically entitled to a better freight allowance than the other markets located with them in zone four.

To cover this situation it was the sense of the meeting that the cities of Richmond and Norfolk were entitled to one cent per gallon differential over the respective prices for zone three.

Taking up then the suggested revision for other zones logically determined by careful freight analysis the following recommendations obtained:

That zone one as revised should stand approved.

That zones four, five, six, seven, and eight as geographically revised should be approved. Also zones two and three as originally drafted.

That the following uniform freight allowances for the various zones were fair and proper allowances based upon an analysis of the average freight rates obtaining for such territory from oil shipping centers, and such

allowances should stand recommended and approved by the meeting:

Zone 1, base.
Zone 2, 1 ct. over.
Zone 3, 2 cts. over.
Zone 4, 4 cts. over.
Zone 5, 6 cts. over.
Zone 6, 7 cts. over.
Zone 7, 8 cts. over.
Zone 8, 11 cts. over.

A discussion of the Canadian territory then ensued, and it was the sense of the meeting that Canada should be identified as zone nine, and because of duties and varied freight rates for that territory it was recommended that this zone be quoted by the respective subscribers at their various prices on a mill basis, f. o. b. at the point of shipment.

As the zoning now determined upon was considered correct for prevailing freight rates it was the sense of the meeting that the same should stand; that any subscriber might propose or make changes in such zones by immediately publishing such action, or suggested action, through the bureau. (R. 671–2.)

Considerable oral testimony was introduced relative to the zoning system, and the theory upon which it was based is as well explained by Mr. W. O. Goodrich of the William O. Goodrich Company as by any other witness. He testifies that it was a way to charge freight rates so that it was not necessary to go into extensive calculations in figuring the rate of freight to any point in a zone; that the basic rate was made at the point where the seed originated,

and they figured that a mill at that point was manufacturing at the lowest or basic price, and that the price should be in accordance with the cost of freight to get the goods from that point to the various points in the country; that the zones included certain areas that had approximately the same freight rates in order to eliminate small differences to various local points in these zones. (R. 96. See also evidence of Samuel Mairs of the Archer-Daniels Company, R. 78; F. C. Smith of the Minnesota Company, R. 109; and Frederick K. Quine of the American Company, R. 118.) In other words, there were two elements of freight that entered into the price of oil delivered at a given point: First the freight on the flaxseed from the place where grown to the crusher, and, second, the freight on the oil from the crusher to the point of delivery.

Mr. Mann of Mann Bros. Company, whose factory is in Buffalo, N. Y. (R. 66), says that the crushers purchase their flaxseed from the Canadian Northwest and the Northwest in the United States and from the Argentine Republic (R. 66–7), and that the principal points at which seed are crushed and oil produced are Minneapolis, Buffalo and New York, and that sometimes conditions are such that Minneapolis crushes more than Buffalo or New York and again New York might do the biggest crushing. In fact New York is the great market (R. 70). Mr. Quine of the American Company gives the names of the principal mills that are located in Buffalo and New York (R. 121), and Mr. Mairs names the principal

mills in Minneapolis (R. 179). Mr. Tompkins, a traffic counsellor, says that he has studied the zone map and explains the zone system (R. 132–3). If he did not figure out the several zones he certainly is familiar with the details of their creation (R. 132–3). He testifies that he took each State in a group, and what appeared to be a centrally located city in each State as an example of the conditions in the State, and added the freight rates to each of them together and struck an average by dividing by the number of cities. For illustration, in making an estimate for the first zone he took Wausau, Wisconsin, the rate to which from Minneapolis was 25¢; Duluth, Minnesota, the rate to which was 12½¢; Decatur, Illinois, the rate to which was 25¢; and Rockwell City, Iowa, having a rate of 34¢; and from them obtained an average for the first zone. In zone 2 the points considered were Indianapolis, Grand Rapids, Columbus, and Charleston, West Virginia, and he in like manner mentions the points considered in estimating the rate to points in the other zones (R. 132–133).

At one time the crop of seed in the Northwest was short, and they had to draw the supply very largely from Argentina, and Mr. Mairs says that they could then lay their seed down in Buffalo as cheaply as they could in Minneapolis; and that the price was then made the same for zone 1 as for zone 3; that "there was no change in zoning, merely the two zones were the same," but that at other times they adhered to the plan of zone 1 being regarded as the base and in zone 2 the price was 1¢ higher and in zone 3,

2¢ higher, etc. (R. 82). The change in the zoning system because of the necessity of securing seeds from Argentina was also testified to by Mr. Goodrich (R. 96–8) and Mr. Smith (R. 108). Mr. Goodrich says that he thinks the change in the basic point at that time was the subject of a resolution or discussion, as was the adoption of the zoning plan, and thinks that it was up at a meeting of the Bureau. He continues: "I would say that it took the form of a recommendation and that it was more or less unimportant, because the change had already been made. It had taken place by reason of the change of conditions and the fact that the seed then originated in New York, as far as this country was concerned. The subject was discussed, the recommendation was made, and we all acquiesced in the recommendation" (R. 98).

There is no question but that under this system the charge for transportation made by the crusher was in every instance arbitrary and not the actual cost of transportation. This is necessarily true from the method of making up the charge for each zone, the charge consisting of the average of the freight charged from Minneapolis to an important or central point in each State in the zone; and therefore the charge even to the points upon which the estimate was based could not be the actual freight to either of those points. Mr. Goodrich says: "It did not always follow that it cost exactly two cents a barrel to get into zone 2, but it was as near as we could approximate it. Our contracts read 'f. o. b. point of delivery, freight allowed'" (R. 96).

It is apparent that this is to some extent in direct conflict with the natural method of making prices to a customer. The customer's price ordinarily and naturally consists of the price at the point of production, which should include a reasonable profit, plus the freight to the point of delivery. Minneapolis appears to be the point upon which this entire zoning system is based, and if all oil were shipped to purchasers from that point, the general principle of the system, in so far as the price of oil would increase with the increase in freight rate from Minneapolis, would be natural. But as heretofore shown, a great quantity of oil, probably the greatest quantity, is produced at Buffalo and New York in zone 3, the prices in which are 2¢ higher than in zone 1. The claim is that this increase is justifiable because of the freight on seed shipped from the Northwest, but the evidence shows that the seed crushed at Buffalo and New York are obtained mainly from Argentina (Mairs, R. 80). The record, however, does not disclose the difference in freight on seed shipped to Buffalo and New York from the Northwest and on those shipped from Argentina. But conceding that the 2¢ additional on oil in New York over oil in Minneapolis is justified by the price of seed, *yet there can be no excuse whatever for the differential of 1¢ between the price of oil manufactured at Buffalo and New York in zone 3 and the price of the same oil when delivered in zone 2.* Under this system the crusher who produces oil in Buffalo must charge 1¢ more per gallon in Buffalo or at any other point in

New York than he charges for oil shipped into Ohio, Indiana, or Michigan. No one attempts to give any reason for such a discrimination, and that none can possibly be conceived of is shown by the following testimony of Mr. Quine of the American Company:

> Q. You could make sales from Buffalo into zone 2, in certain points in zone 2, where the freight rate would be no higher or no different from sales into certain points in zone 3?
>
> A. Yes, sir.
>
> Q. Now, then, on those sales you would have to charge, although the freight rate was the same—you would have to charge a higher price on the sale into zone 3 than you would on the sales into zone 2?
>
> A. Yes.
>
> Q. Precisely. How is that justified?
>
> A. Well, that has been a common custom of the trade for two, three, or four years since I have been in it. (R. 118.)

The adoption of this zoning system was, in itself, an unlawful agreement in restraint of trade, because, while it did not fix the base price to be charged by each of the manufacturers, yet it did obligate them to observe these fixed differentials, and prevented them from meeting special competition that might exist in other zones. For illustration, suppose the conditions in zone 1 were such that a manufacturer was justified in selling oil at say $1.50 while in another zone special conditions existed requiring a lower, or justifying a higher, relative price than existed between the prices of the two zones according to this

agreement, yet the manufacturer would be prohibited from meeting these special conditions. Defendants say this is not true, because the member was at liberty to meet such a condition by making the price and immediately wiring it to the Bureau. But it was anticipated, and the records show it to be a fact, that a member would not take such a course except in the rarest instances. Furthermore, the wiring in of the new price *under this agreement automatically changed his prices in every other zone, and it was impossible to meet special conditions in two zones at the same time.* Again, suppose the manufacturers, *influenced solely by the state of the market in zone 1*, should reach a uniform price in that zone, *by virtue of this agreement the uniformity would exist throughout the entire territory of the United States.*

The allegation in the several answers that this zoning system is used by those engaged in a number of industries is true. Mr. Tompkins, defendants' expert witness, says other organizations use it, and mentions the Steel Valve Manufacturers Association and the Salt Producers Association (R. 130). In fact many *associations* use this or a similar system. But the real purpose of its adoption is the same in every instance. It is obvious that no plan to fix prices or make them approach uniformity can be successfully carried out unless some method be devised by which freight rates to points of delivery can be readily determined; and this zoning system is, possibly, the most ready method of ascertaining the rates to be charged. The same price is quoted for

every point in zone 1; and a mere glance at the map shows in what zone the point of delivery is situated, and the addition of the differential is but a child's problem in arithmetic. Thus by agreement, of which a record was made, the defendants have departed from the custom of adding to the price at the point of manufacture the actual freight to the point of delivery, and have adopted arbitrary rates applicable to all of them. It is perfectly obvious that this was done for the purpose of eliminating, or at least reducing, the pressure of competition, and of "stabilizing prices", as it is called by members of industrial associations.

MEETINGS.

The clauses in the contract between the Bureau and the members relating to meetings provide that monthly meetings should be held by the subscribers at some convenient center, of which notice should be sent out by the Bureau two weeks in advance; that the meetings should choose their own chairman, but that a representative of the Bureau should act as secretary and "present to the meeting any and all matters pertaining to the linseed oil, cake and meal industry to be therein openly discussed for the benefit of the industry and the public welfare"; that subscribers might send to the Bureau notice of matters they might wish to have discussed, and if in accord with the spirit and letter of the agreement and the object of the service, the Bureau would cause same to be docketed and presented to the meeting; that all subscribers should "report at these meetings on all

matters and conditions within their knowledge affecting the industry and within the limits of this agreement that they may be there discussed for mutual benefit''; that each subscriber present should have one vote for every thousand bushels of flaxseed; that representation of two-thirds of the votes of all the subscribers should constitute a quorum; that a member of a partnership or an agent of a corporation with proper credentials might act in behalf of the subscriber, and that the subscriber would be bound by his action; and that a subscriber failing to attend or be represented at any meeting and to "be in punctual and continued attendance thereon shall be subject to a fine of twenty-five dollars ($25.00) for each offense, the same to be collected by and payable to the Bureau" (R. 174–5).

These meetings are very important in two respects. In the first place, the provisions of the contract show that every phase of the industry that might suggest itself to the mind of any member was subject to discussion, and that each subscriber could be subjected to a searching cross-examination concerning any transaction had by him or any practice incident to the manufacture or sale of oil. In the second place, it was clearly contemplated by the contract *that the meetings constituted a body for the transaction of business in the manner in which parliamentary bodies ordinarily act, and that when an action was taken by a meeting properly organized and consisting of a quorum such action was binding upon every subscriber.* No other inference can be drawn from the provisions relating

to the organization of the meetings, and especially that paragraph which declares that the subscribers agree "to be fully bound" by the acts of their representatives. If these meetings were only for loose conferences as to the conditions of the industry their organization was unimportant and no action taken would have been binding. Therefore, by virtue of this contract every resolution properly passed was an agreement between all the subscribers.

The minutes of the meetings relating to a number of subjects are considered in discussing those subjects, but the nature of the meetings appears from the testimony of Mr. Ferry and Mr. Armstrong. Mr. Ferry says that they sent out a docket a week or two in advance of each meeting which set forth the matters that had been suggested by the crushers for discussion; that the program almost exactly followed the docket except where occasionally one discussion would lead into another channel and bring up another subject; and that most of the men who attended were the executives of the companies, and as a rule the same men attended each meeting. After the attendance was taken they had what they called the "round table," or "roll call," which was in a sense a means of clearing away any possible little misunderstandings that had been held over from the written exchange of market information. For instance, one manufacturer for his own reasons might wonder why another manufacturer had done a certain thing. The first man in alphabetical order

was, "as we say, 'put on the carpet,'" a term which meant comparatively little. Then they would go around and call the roll of the others, and each had the privilege of asking such questions as he desired of the others. He says there was absolutely no bitterness or animosity at any of the meetings; that occasionally at the "round tables" one man might ask another about the base price in some transaction which he did not understand, or there might be some detail that he wanted cleared up, but which he had not thought was important enough to write a special letter about, "and concerning which he has just said to himself, 'I will wait and ask the other man at the meeting.'" He says there had never been a discussion "as to what prices *were to be* charged by any of the crushers"; and if such a discussion seemed imminent, which had been the case at times, the Bureau promptly cut it short, or rather, cut it out altogether (R. 86).

Mr. Armstrong also gives a similar description of the meetings (R. 136).

The following entries on the minutes are illustrative of what use was made of the Round Table. In the minutes of the February, 1919, meeting appears the following:

> Round table: The roll was then called and each member subjected himself to any question on past and closed transactions, and this order of business was gone through with no questions being asked which did not meet with full explanation (R. 415).

And the following appears in minutes of the March meeting, 1919:

> Under this order of business the roll was called, and each member subjected himself to any questions on past and closed transactions, and as usual this order of business fully demonstrated its value (R. 416).

No comment is necessary to show how effective must have been the friendly companionships prevalent in these meetings as described by Mr. Ferry, and these searching examinations of each member about all of his "past and closed transactions." No doubt their value was "fully demonstrated."

COMMUNICATIONS AND ADVICE BY THE BUREAU TO ITS SUBSCRIBERS.

Efforts to suppress fluctuation of prices.

It will be observed from Exhibit 3 (R. 183–184) that there were very frequent and rather pronounced fluctuations in prices during the month of October, 1918. As the Bureau began to function on October 1, this was before the system had become effective. Mr. Armstrong says it required four or five months for its operation to fully develop (R. 135). But work was begun at once on this situation. On October 19 the Bureau sent out the following communication to its subscribers:

> The bureau is substantially impressed with the fact that in the last ten days there have been innumerable, sudden, and seemingly unwarranted price revisions by several of our subscribers, which have thrown the linseed-oil market into a chaotic condition.

So far as our investigations are concerned there seems absolutely no reason for these wide fluctuations in price unless it be that overspeculation in seed must now be adjusted by the sale of oil; and if so, all will readily agree that this is an unfair condition in the market, so far as sound manufacturing and merchandising are concerned.

There have been other instances, which we are now investigating, where a considerable quantity of oil has been sold at "special prices," greatly less than published prices, and the unfortunate part of this particular sale, from the standpoint of good business, is that competitive quotations in that particular instance show that the seller actually sacrificed much more per barrel than he need have sacrificed in order to secure the order by the "cut-price method."

The bureau's service does not presume to direct any of the subscribers in so far as prices which they feel called upon to quote, but we do feel that it is well within our province to bring to the attention of the subscribers in the most forceful manner the fact that the service as the subscribers are using it is not delivering that measure of value to each one which it is designed to deliver and will deliver, provided we can substantially introduce "INTELLIGENT COMPETITION."

Many manufacturers do not realize that in sharply declining markets presenting the "hysterical activity" which the linseed-oil market has presented in the last two weeks,

many sales which they make will act as a boomerang against them when such buyers find they have not gotten in at bottom prices.

This is one of the most substantial arguments in favor of a more or less stable market from the standpoint of both buyer and seller, and it is one of the underlying principles necessary for the successful operation of this service.

The bureau, and we feel many of our subscribers as well, are willing to concede that we can not and must not expect to put this service smoothly into operation at the onset, but each and every one must realize that from the signing of the service contract they are under very definite obligations to cooperate fairly and intelligently to the best interests of the industry, and if "unintelligent selfishness" is apparent in any of their operations to the extent of unfairly imposing upon their competitors, then we are going to have great difficulty establishing and maintaining the "100 per cent CONFIDENCE" which must obtain if the linseed oil industry as a whole proposes to stand out from the crowd as substantial coworkers under modern cooperative business methods.

This general letter to our subscribers, I believe, will further fulfill its mission if those who support my contentions, and without egotism that should be all of you, will write a letter of comment for publication through the bureau, so that each and every one may be placed on record clearly and substantially before their fellow competitors (Capitals the Bureau's) (R. 340–341).

On October 24 the following market letter containing the replies of the members to this communication was bulletined.

American Linseed Company, October 22, 1918:

> "Your market letter No. 36, in which you ask for comments on same to be placed before our fellow competitors, is received.
>
> "From our viewpoint the points which you make in this letter are well taken, and I think a review of the action of this company in a reduction of its price will bear out its opinion as to what should have been done.
>
> "It is our opinion that the whole plan of the bureau has been missed in the recent handling of prices. We believe that prices which have been quoted have not been justified for the reason that the oil on hand at the present time has probably cost more than it is being offered for at the present time. If there was to have been a considerable decline, and I am inclined to think there should have been some decline, it should only have been put in effect on oil to be delivered during December forward. October and November oil, as pointed out above, has cost more than present market prices.
>
> "I do not believe that there is any demand whatever for manufacturers to take less than cost for the goods which they have accumulated, these goods having taken more judgment and more difficulties to purchase than at any time in the history of the industry. I believe, like you, that no plan can be put into perfect working order at once, but I believe the actions of the last two weeks should be a very splendid reminder to all of

us that we can do much better without working any hardship whatever upon the buyers or upon ourselves.

"It is our opinion that the reduction has much more upset the buyers and made them more dissatisfied than any action which has been taken in a long while, for it must be borne in mind that our customers in turn have contracted for their supply at a higher price, and they are having to reduce their prices because of the manufacturer to such an extent as to probably eliminate profits."

Midland Linseed Products Co., October 21, 1918:

"We acknowledge receipt of your market letter No. 36.

"We believe that market conditions during the past three weeks have justified a considerable decline in the linseed oil market, but we believe that this decline has at times been unduly rapid. We heartily indorse your general argument and believe that all crushers should endeavor to avoid the hysterical condition which, we are inclined to agree with you, have existed during the past two weeks. Some of the recent declines, we believe, have been initiated after a considerable advance in the seed market.

"We can not refrain from calling your attention to the record of the last three weeks, as shown by your market reports. You will find that during the three weeks just past the linseed-oil market has declined 31 cents per gallon. You will find that this company has done nothing more than meet prices which have been initiated by competitors with the

single exception of one decline in the market, amounting to 2 cents per gallon."

Spencer Kellogg & Sons, Inc., October 21, 1918:

"Answering your letter of the 19th we do not feel there is anything hysterical in regard to the conditions of the linseed oil market. There are legitimate reasons for a decline in price to the present value, and we, for our part, have not planned our declines in price to take advantage of any particular order which we might have secured at that instant.

"Some feel that the advantage lies with the concern making the decline in price, but we simply took the initiative because we felt the time was ripe to have a lower price. We feel that it is a great mistake for subscribers to lower the price list just for the purpose of securing an order, and if this thought is adhered to, do not think there will be any loss of confidence among us."

The Toledo Seed & Oil Company, October 21, 1918:

"In response to your market letter No. 36, dated October 19th, with reference to the very sudden decline in the price of linseed oil, wish to commend you for presenting the matter as you have.

"It is common knowledge that whenever a market, be it oil or shoestrings, begins to drop suddenly, every prospective buyer immediately loses his enthusiasm to buy, expecting every moment the market will drop still more. Just as soon as the market turns and starts to advance, all those who are prospec-

tive buyers not only are anxious to buy, but many who have not thought of buying may show considerable interest.

"It would seem to us that a gradual decline would be much more beneficial to both the buyers and the sellers as indicated in your letter, than an apparent wild scramble to see who can reduce the fastest. However, our minds are open to correction if we are wrong" (R. 344–345).

Some influence had well stabilized the market by December 1st, as there was no change of quotation during that month, but three in January, one in February, and two in March (R. 184).

Effort to secure prompt cooperation.

It appears that some members of the Bureau were not cooperating as promptly as desired, and on November 6, 1918 a letter was sent to the subscribers by the Bureau in which the following rule was promulgated:

> If, at the expiration of a reasonable time, any subscriber has not replied to an urgent inquiry from the bureau, either with the information requested or a communication indicating that a longer time is required to secure such information, then the bureau will telegraph collect any and all subscribers, prompting them to send in such advice, and such subscribers, on receipt of said telegram, will immediately telegraph the bureau, prepaid, the information requested, or if such information can not be completely transmitted by wire, then this return telegram

shall specifically state when such information will be fully dispatched by letter. An acknowledgment by wire to the bureau's wire must be sent in any case.

"This regulation is so obviously entirely in the interests of our subscribers that the bureau has departed from its usual method of precedure of submitting such questions for approval before instituting the same, and we are taking it upon ourselves to put this order into operation on and after November 11th (R. 350).

Efforts to prevent one subscriber from bidding against another.

Some criticism had arisen over a sale made by the Ankeney Company's agent in Kansas City, and the agent had written the company a letter, a copy of which had been sent to the Bureau, in explanation, and in that letter the agent said:

> Mr. Price gave me his word of honor that he had a price of $1.50 from a responsible concern and we could not question him as he said to forget it if we did not want his order at this figure and we were urging him for the business.

The Bureau thought it of sufficient importance to send out this letter to its members with the following comment:

> The sale covered by the following letter illustrates so fully that the old Bunkum Buyer methods are still effective with the spineless salesman who is also still in our midst that the bureau publishes it as a market letter rather than as a special sales report.

Midland will assist in checking the buyer a statement in this case if he will at once investigate his agent's quotation.

Let us have our respective agents and salesmen educated as soon as possible to the point where their sales will be made at their prices—not at their competitors' offerings or reported offerings—and we shall then find that we have real salesmen, not order takers, and the industry will be better for it (R. 355).

On September 27, 1919, the Bureau wired the Midland Company calling attention to the hour at which a message reporting a price was received, and, also, to the differential of three cents in Richmond over zone 1, there apparently being a discrepancy between the price reported and that differential. On the same day the Midland Company replied showing the promptness with which their report had been made, and also saying that:

In this connection we wish to state that some of our customers advised us a day before the last decline in price on the part of our competitors that the price was going to be reduced 10 or 15 cents per gallon within 48 hours. Furthermore, we received word from several of our agents that our competitors had reduced prices several hours before we received your message notifying us of the decline in price, and you must, therefore, have either delayed in relaying the message or competitors must have delayed in notifying you of the change in price (R. 490).

In reply to this letter, on September 29 the Bureau said:

> The writer, however, is particularly interested in the information contained in the third paragraph thereof, as it bears directly upon full and complete cooperation of the various council members with the terms of the service contract.
>
> This matter of forecasting market revisions has been pretty generally covered in our past discussions; *it is also of record that the practice of a seller reducing his prices to meet a buyer's offering, as also covered in the discussions at the New York meeting, bears again on this same matter which involves the ethics of the work rather than the letter of the contract.*
>
> *Therefore, in view of the fact that these matters have been sufficiently covered in the general discussions at our meetings, it would seem in order for the bureau to actively follow up your reports,* if you will be kind enough to give us some more definite information. I am sure you will appreciate the desirability of thus cooperating with the bureau in order to correct or clear any of these matters (R. 490–491).

Of a like character was a discussion had at the meeting of September 18, 1919, as shown by the minutes. The minutes of that meeting recite that—

> Mr. Warner brought up a very interesting point as to whether or not a revision of price on the part of any council member had obtained in the past *through such company having in hand a substantial order at materially lower prices than their last reported quotations as an incentive to such a revision.*

It is further recited that—

> The issue here was more one of ethics, and as such was fully discussed, but no conclusions were attempted nor arrived at, *excepting that it was evidently the sense of the meeting that this point of ethics should be observed so that any actually unfair merchandising policy* might not result (R. 487).

Efforts to secure reports more promptly.

On January 24, 1919, a letter was sent out by the Bureau giving extracts from the minutes of the meeting of the day previous showing that action was then taken to require that reports be more promptly filed, and pointing out wherein there had been laxity (R. 378–379). At the meeting of January 23, 1919, for the purpose of determining whether or not absolutely correct price lists were being received, the following action was taken:

> Motion by Mr. Kellogg, seconded by Mr. Warner and unanimously carried:
>
> "Moved that on and after date all oil, cake, or meal sold to members by other council members must be reported in exact accordance with the provisions of the service contract, excepting that in the weekly sales report sale of such oil, cake, or meal shall be separated and otherwise specifically identified" (R. 379).

On October 1, 1919, the following market letter was sent out by the Bureau:

> All subscribers please reply.
>
> The bureau has recently been furnished evidence indicating that council members are

not living up to the letter and the spirit of the service contract in the matter of furnishing the bureau immediate notice of changes in their respective prices.

This question has been touched upon in the past and it has never been lost sight of by the bureau, but recent developments have obtained which indicate a possible violation of the bureau's rules covering this obligation.

This is a positive notification to all council members that they will be held strictly to a full interpretation of the terms of the service contract covering the exchange of this market information. If there are any violations, action will be taken at once.

Will all subscribers please acknowledge receipt of this market letter, advising the bureau that steps have been taken by them to see that the individual, or individuals, in their organization responsible for the dispatch of this information has been substantially impressed with the serious nature of this complaint and the necessity for guarding against any future cause for like complaints.

The moment a quotation to your trade has left your hands it constitutes a basis for your immediate advice to the bureau to the same end (R. 488–489).

By market letter dated October 10, 1919, it was said that replies to the market letter of October 1 indicated the need of further clearly understood regulations covering the matter, and the following rule upon the subject was promulgated:

Rule: To provide that the daily market information, as relayed by the bureau, shall at all times contain the fullest measure of "news value," it is agreed that no council member shall dispatch changes in his prices as last filed with the bureau to more than one agent or buyer *without immediately thereafter, and before sending such information to any other agent or buyer,* telegraphing such full and complete information to the bureau as otherwise provided in the service contract.

It is further agreed that the term "immediately" shall be construed to mean no greater lapse of time than thirty minutes in any case.

Your notice of support of the above rule will signify that you have already so instructed those in your employ responsible for its faithful observance (R. 496).

At the meeting on October 29, 1919, the following action was taken:

In the matter of market letter No. 805, the following legislation was moved by Mr. Nolan, seconded by Mr. Ramsey, and unanimously carried as a modification of the present method of reporting:

Moved that hereafter all reports of changes in prices of the respective council members shall be furnished the bureau in the usual manner as provided in the service contract, with the addition that all telegraphic information to the bureau covering a change in prices by such subscriber shall carry (in that telegram) the exact time—hour, day, and date—when such quotation has been made to such seller's trade, together with the exact time—

hour, day, and date—when such information is relayed to the bureau by such subscriber; and that the bureau's telegraphic report and confirmation of such information shall convey that information fully and completely and exactly as received, together with the time—hour, day, and date—when such information was received and relayed by the bureau.

It was moved by Mr. Kellogg, seconded by Mr. Mann and carried, that the following ruling, set forth in market letter No. 805, should be adopted:

Moved that in order to provide that the daily market information as relayed by the bureau shall at all times contain the fullest measure of news value, it is agreed that hereafter no council member shall dispatch changes in his prices as last filed with the bureau to more than one buyer without *instantly thereafter* telegraphing such full and complete information to the bureau as, and in the form, required by the service contract (R. 512–513).

It appeared that the Minneapolis office of the Spencer-Kellogg Company sometimes initiated prices, which that office first telegraphed to the principal office at Buffalo, and it was thence relayed to the Bureau. Because of this slight delay, the Bureau, by market letter issued on November 11, 1919, made the following comment and notice:

It will be seen that if this market information from Minneapolis would have to be relayed to Buffalo and thence to the bureau, the news value of such information would suffer materially.

> As it is possible that similar situations obtain with other council members, this is official notice that if such is the case with any other crusher, where any of his branch offices are privileged to make their own market, so to speak, without first receiving authority from the home office, it will be necessary that those branches be directly connected with the bureau on the same sort of reporting plans as obtains from the home office (R. 522).

The Midland Company, on November 12, 1919, wrote the Bureau that in its opinion the authority of a subordinate office to initiate prices was "decidedly undesirable as setting a precedent which, if followed by other crushers in other markets, will result in endless confusion, will decidedly reduce the value of the bureau service and might in the end result in the disruption of the service entirely" (R. 525). And on November 22, 1919, the Spencer-Kellogg Company wrote the Bureau that they had read this letter of the Midland Company, and that they felt that it had "undoubtedly stated truths about business management which have very general application," and that "we feel that the occasion for which we adopted the method of independent price making on linseed meal at Minneapolis has passed and are glad to say that we intend to adopt the suggestion of subscriber No. 6 to centralize at Buffalo the control of oil-meal prices" (R. 532–3).

How successful the Bureau was in securing prompt reports appears from Government's Exhibit No. 2, which is a table showing the minute when each price

was filed by the subscriber, the minute when received by the Bureau, and the minute when relayed (R. 178–183). This table begins with reports filed on November 25, 1918, and continues till April 6, 1920. Government's Exhibit No. 17 (R. 675–6) illustrates the same fact. That exhibit shows prices wired the Bureau by the Archer-Daniels Company during the year 1919. It appears from this exhibit that the Archer-Daniels Company during that year wired fifty-six changes within the following periods of time after filed: 5 five minutes after filing, 2 seven minutes, 4 eight minutes, 14 ten minutes, 1 thirteen minutes, 11 fifteen minutes, 2 twenty minutes, 2 twenty-five minutes, 2 forty minutes, 1 forty-five minutes, 1 fifty minutes, 1 night message, *5 ten minutes before prices were filed, 5 fifteen minutes before, and 1 five minutes before.* Mr. Mairs says that "the statement in the telegram (plaintiff's Exhibit 17) 'From 17th November wired bureau before wiring agents at bureau's request ten minutes' means that we wired the bureau ten minutes before we wired our quoted price to our agents (R. 102), and that they continued that practice after November 7 [17]. *Yet great emphasis is laid upon the claim that no future prices were communicated to the Bureau.*

Application of zoning system to carlots and less than carlots.

Believing that there was some uncertainty as to whether there was a uniform understanding as to zone prices relative to full carlots and less than carlots, the American Company, on January 31, 1919, wrote the Bureau as follows:

> We have advised our various stations that zone prices which we may have in effect shall include in the case of full carlots, direct shipment, freight allowance to destination, and that in case of less than carlots price shall be f. o. b. cars where we carry stocks.
>
> We shall be glad to be advised that other council members are following the recommendation which was made at the last meeting in this respect, and which conforms to the action which we have taken as above (R. 386).

By market letter issued February 14, 1919, the replies of eleven members to this inquiry were circulated among the members, each stating specifically what it was doing (R. 402–4).

It is apparent that uniformity in a practice is far more easily reached by this method than by direct correspondence between the members. Here was first in a meeting a specific recommendation made to the entire membership. Subsequently a member inquired through the Bureau of every other member as to whether or not it was observing the recommendation; and the replies of all members showing what they were doing were in a communication by the Bureau transmitted to them all (R. 402–4). A more simple and efficient method of establishing and maintaining uniform action can not be devised.

Efforts to extend the influence of the Bureau.

Efforts upon the part of the Bureau to extend its influence and to preserve the solidarity of the producers are manifested by the following actions taken by it. On April 28, 1919, the Bureau sent to the

Canadian Linseed Oil Mills, Ltd., of Montreal, Canada, a letter in which it first explained the Bureau's plan of operation and then said:

> We believe that such a service as this bureau affords, and which we have been affording for upwards of three years, is an absolutely necessary service, because we do not believe that it is possible for any group of manufacturers to maintain an agreed price (even though such agreements were lawful in this country, which they are not) for any length of time, as such agreements can not be carried out under the law of business economics, and disappointment is bound to result (R. 446).

And, further:

> Speaking for the crushers here, we can assure you that on the basis of an exchange of like information for like information we can keep you advised at all times of the prices being quoted into Canadian and other foreign markets by the American crushers, and can go farther and supply you with complete sales information, in return for which we, of course, should have at all times similar accurate information covering the prices of your company.
>
> Under our system of operation it does not obtain that with this information competitors are disposed to undersell one another; to the contrary, we have found that the market becomes fairly stabilized and naturally the sellers are immediately freed from the unfair tactics of the buyer who invariably represents that the compeititon is much below prices quoted (R. 447).

These statements of the Bureau indicate its real purpose, and from experience what it actually accomplished. It of course was cautious to state the results in modest terms.

An effort was made to get the Fredonia Linseed Oil Works Company to join the association. That company in its reply dated February 3, 1919, pointed out that its production was comparatively small and that its sales were confined to its surrounding territory, and that activities of the authorities of Kansas, the State in which it was located, rendered it inadvisable for it to become a member. The letter is quite apologetic in its tone (R. 413–15). The Bureau was not satisfied with this reply, realizing that its efficiency depended upon the percentage of oil that was produced by its members. And, on September 2, it reported in a market letter its continued efforts to secure the membership of the Fredonia Company. It stated that the Bureau had persistently followed the matter up with Mr. Wiley, their president, to the extent that, "We have now carried the question before Honorable Robert J. Hopkins, Attorney General of the State of Kansas, the reason for that action being that Mr. Wiley finally took the stand that the laws of his State were designed to prevent any cooperation whatsoever between competitors, or words to that effect" (R. 465). It was claimed that a letter had been received from the Atttorney General in which he expressed a willingness to pass comment on the explanation of this Bureau's service which it would make to him in person, and that thereupon it had notified Mr.

Wiley that it was prepared to go before the Attorney General on the condition that if his comment was favorable the immediate enrollment of the company would be expected, and the letter closed as follows:

> It is evident that we have "knocked the pins" from under Mr. Wiley's final excuse, as he sidesteps the issue and advises us under date of August 25th that he will be in Minneapolis some time in the near future and expects to take this matter up with some of the crushers in that city, and will write us fully upon his return to Fredonia.
>
> Will all council members located in and around Minneapolis please be on the lookout for the "wiley" Mr. Wiley? (R. 466.)

On September 2, 1919, the president of the National Paint, Oil and Varnish Association sent a letter to the Bureau in which it rather urged that the Bureau connect itself with that association, pointing out that practically every corroder of white lead or red lead, manufacturers of mixed paints or varnishes, manufacturers of brushes, plate glass, cans, naval stores, and in short every article that is sold to the retail trade that supplies building and decorating material was a member of that association. It referred to a number of associations that were connected with the National Paint, Oil and Varnish Association and suggested that they should call themselves bureaus of that association, apparently fearing the term association as indicated by the following:

> At present the public is becoming alarmed at the remarkable growth of trade associations.

> There is a general suspicion that the object of these associations is to increase prices. This is natural. Why do these men who have always been bitter competitors unite themselves in an association? Why do they pay large sums of money into the organization for the operation of their association? Why is it that after the associations have been formed the prices of the articles manufactured have invariably increased, with larger profits to the members? (R. 469.)

And in discussing the advantages of such connection it was said:

> I believe, therefore, that if all of the associations in the allied industries that are members of the N. P. O. & V. Association would call themselves bureaus and their secretaries "assistant secretary" of the N. P. O. & V. Association, and thereby take themselves out of the class that is very soon to be critically examined by the public and Government, they would display rare tact in so doing. Even cost sheets, which were displayed in full to the Government during the war and are now being given to members of the several institutes, could without detriment, in my opinion, be reported to the secretary of the N. P. O. & V. Association. *The only persons from whom ordinarily we would desire to conceal our cost sheets are our competitors. If we are giving this information to our competitors we certainly would suffer no harm by giving it to the association.* However, at this time I am not seeking to go that far. Any information which the flaxseed crushers of America or the other associations

> mentioned deemed unwise to give to the public, need not be given. Enough can still be given to make the national association a distributor of important statistical information (R. 469–470).

This matter was taken up with the members of the Bureau; and in a letter from Mr. Armstrong to the National Association dated September 25, 1919, it was stated that the matter had been under consideration at a meeting of the members, and they were clearly averse to the intimate alliance with the National Association as suggested, possibly because of the fact that the Bureau's group was not altogether in sympathy with the association plan of cooperation, and preferred to maintain and emphasize their identity as individual subscribers "to this cooperative service"; but that, "On the other hand, the meeting was quite in sympathy with any amplification of the present exchange of statistical information which would work out to the mutual advantage of both buyer and seller, and to that end the bureau is commissioned to suggest for the consideration of your association an exchange of statistics (R. 486). It does not appear, however, that any alliance between the Bureau and the National Paint, Oil and Varnish Association was ever perfected.

Withdrawal of Spencer-Kellogg Company.

It appears that during the week previous to January 26, 1920, the Spencer-Kellogg Company gave notice of withdrawal from the Bureau. Because of this notice a lengthy letter was published by the Bureau of

that date pointing out the great efficiency of the Bureau and its accomplishments. The principal reason assigned by Spencer-Kellogg Company for withdrawal was that the Bureau had caused other concerns to enter the industry, which would bring about over-production. It was manifestly thought that this was brought about by an increase of prices, thus making it an attractive field for one entering business; but it was shown in the letter that there had not been a substantial increase of the capacity of the mills since the organization of the Bureau. It was further said that the Bureau could greatly assist in procuring purchasers of the mills of members at advantageous prices, as those desiring to enter the industry would likely prefer to buy a plant in operation to building a new plant (R. 582–3). However, the Spencer-Kellogg Company did not withdraw its resignation, which took effect on February 20; and it was stated in a market letter that—

> Their resignation, as explained to me, is based entirely on the fact that their property interests in the industry are such that further expansion in any of the present plants, or the building of additional linseed oil plants by other interests reported to be coming into the industry would jeopardize those interests.
>
> They further contend that the constructive results accomplished for the industry through the efforts of the council under the bureau's service have directly contributed to that end (R. 590).

The letter then gives a list of the presses that had been installed since the organization of the Bureau as fifteen in number, all of which were being installed when the members subscribed (R. 589–590). It is remarkable that with oil selling at such an enormous price no other producers are shown to have entered the field, or the extension of existing plants begun during the existence of the service. The causes must have been a tacit understanding among the producers and fear entertained by outsiders of the close combination of the producers through the Bureau.

Terms of sale.

The council also had before it at various times the question of terms of sale. The following extract from the minutes of January 23, 1919, appears in market letter issued January 24, 1919:

> The following resolution, made by Mr. Kellogg and seconded by Mr. Ramsey, was unanimously approved:
>
> "Resolved, That this council's recommended terms for the sale of linseed oil be 1 per cent ten days or thirty days net, trade acceptance from the date of shipment, and all members instituting these recommendations, or any others, shall advise the bureau of such action not later than January 27th" (R. 378–379).

The matter was discussed at some length at that meeting.

The following also appears in the minutes of the same meeting:

> With further general discussions on this matter it was finally concluded that a new set

of recommendations covering terms and cash discounts for the consideration of the council members was now in order.

The following resolution was then offered by Mr. Kellogg, seconded by Mr. Ramsey, and unanimously carried:

"Resolved that it now be recorded that the recommended terms of this council for the sale of oil be 1 per cent discount for cash settlement in ten days, or thirty days net trade acceptance from date of shipment, and in order that a specific list of the terms of sale of all the council members may now be compiled and distributed, it is further resolved that all council members shall send to the bureau, not later than January 27th, a full explanation of the terms of sale as quoted by them to their trade" (R. 382).

The Archer-Daniels Company wrote the Bureau as follows:

We have letter from one of our customers as follows:

"One linseed oil crusher has restored the former cash discount 1 per cent 10 days, and one crusher has made same retroactive to November 1st, 1918. We believe you should do the same on such oil was we have purchased from you during this period."

Will you please bulietin the members of the bureau and ask if this is the general practice? (R. 394.)

This letter was relayed to the members by market letter dated February 6, 1919. (R. 393–394.) In market letter dated February 12, 1919, replies of twelve members to this inquiry were circulated

(R. 399). This inquiry coming so quickly on the action of the members in council assembled was manifestly intended to check them up, and ascertain if they had all promptly put the resolution into effect. It will be observed that the resolution said nothing about whether it should be retroactive or not. The replies indicate that some had made it retroactive in all instances, others in just a few, and still others not at all; but apparently all had adopted the discount recommended.

There was a strong effort to secure uniformity with reference to requiring customers to execute trade acceptances. To ascertain to what extent such acceptances were being used by the several members, market letter No. 302, which does not appear in the record, was sent out. Answers of eleven members to this inquiry were embraced in a market letter sent to the members on March 17, 1919 (R. 427–429); and on March 26, 1919, the following excerpt from the minutes of the previous meeting was circulated in a market letter:

> The matter of the enforcement of the terms of the various council members using trade acceptances was then brought up by request of Mr. Matthews, and the discussion of this matter developed the fact that all council members using trade acceptances in their terms were using the utmost effort to secure a strict adherence to those terms by their trade, the only members not advocating or using trade acceptances being the National Lead Company and the Minnesota Linseed Oil Company (R. 438–439).

Thus within a very short period of time practical uniformity in this matter had been secured.

As bearing upon the question of discounts, the Archer-Daniels Company on January 20, 1920, wrote the Bureau the following letter:

> Your remarks on credit inquiry No. F2, Jan. 19th, received today; we note that one subscriber has made the following statement:
>
> "We have a satisfactory guarantee of this account, and under this guarantee we have extended them banking accommodations for 60 days at the legal rate of interest."
>
> It seems to us that in view of the fact that we are in the linseed oil business and not in the money-lending business this falls under the head of unfair merchandising competition. It is our understanding that the universal terms extended by all council members consisted of 1 per cent for 10 days or 30 days trade acceptance.
>
> Would it be proper to ask the subscriber his reasons for continuing this 60-day financing arrangement with Frazer Paint Company? (R. 579.)

Carrying oil after purchased.

There was considerable correspondence and much discussion at the meetings with reference to the practice of some members of carrying oil for the purchaser after the contract period for the taking of such oil had expired. The following appears in the minutes of the meeting of December 3, which was bulletined in market letter of December 12, 1919:

> There was then a discussion of the cost to the seller of carrying linseed oil for the buyer after the contract period for the taking of such oil had expired.
>
> It was shown in this discussion that a very substantial expense to the seller was involved, *and that any failure to recognize such an expense would develop an unfair merchandising practice, and that the council to anticipate that situation should definitely record itself to that end*
>
> It was the sense of the meeting that this council should recognize the fact that an average cost to the seller for carrying oil for the buyer over the time of the contract period for taking such oil represents not less than one cent per gallon per month, or fraction thereof, and that this matter should receive the immediate and full consideration of all, and each should report such merchandising policies as he shall have individually instituted to cover the same not later than January 1st, 1920 (R. 547).

This bulletin invoked a number of replies. Goodrich Company replied on December 15 that under its new contract it would stipulate a charge of 1 cent per gallon per month or fraction thereof instead of half a cent as theretofore (R. 549). Spencer-Kellogg Company replied that it favored the storage charge (R. 550).

Archer-Daniels Company replied on December 15 that from that date forward it would make a charge for carrying oil over time of 1 cent per gallon per month (R. 551). On December 19 the Archer-

Daniels Company wrote the Bureau that it had decided to again reduce its carrying charge to one-half cent per gallon per month (R. 551). On December 23 the Bureau wrote this company a very caustic letter, as follows:

> It is in order for the bureau to comment on your communication above referred to, and published in market letter No. 1069, as exemplifying an "over night" change in policy which is hardly in keeping with the constructive cooperation of your company to date, and which can not operate to the best interests of the industry.
>
> You will remember that a general review of this cost question indicated that 1 cent per gallon per month was a fair carrying charge and would not any more than cover the cost of such service.
>
> *It is constructive merchandising and wholly lawful for any group of manufacturers to arrive at conclusions regarding costs, and it is not fair merchandising for any seller to merchandise at less than cost.*
>
> With these facts clearly in mind, the recommendations were made at the last meeting and fully supported, and as the records show, those council members instituting this merchandising policy have unquestionably sent out a notification to their trade.
>
> On December 15th you announced a support of that policy published in market letter No. 1058, and on December 18th you reversed your decision, based on deductions made by subscriber No. 12 in his letter published in

> market letter No. 1054, which hardly seems to have any bearing on this question of carrying charge, as subscriber No. 12 comments only on the question of variations in freight rates, and you will readily see that *if the bureau does not do what it can to prevent vacillation in matters of possibly minor importance, which this may represent—we may be confronted with the same undesirable situation when merchandising questions of greater importance must be handled with dispatch and certainty for the best interests of the industry and the trade.*
>
> Under the circumstances, the bureau asks your further consideration (R. 555–556).

On December 29 the Hirst & Begley Company reported that they were charging storage of one cent per gallon per month (R. 562). On the same day Northern Linseed Company stated that for a year it had made a charge of one cent and expected to continue to do so (R. 562). On the same day the Toledo Company wrote the Bureau that it had revised its contract form so as to require a storage charge of one cent per gallon per month (R. 563). On November 20 the Ankeney Company wrote that it was going to get out a new contract and would provide therein for the carrying charge (R. 570). On December 31 the National Lead Company notified the Bureau that its carrying charge was one cent per gallon (R. 570). On January 6, 1920, Sherwin-Williams Company wrote the Bureau that effective January 1, 1920, it had made a carrying charge of one cent per gallon per month (R. 570). By market

letter of January 16, 1920, there was bulletined to the members of the Bureau the following excerpt from the meeting of January 7, 1920:

> The bureau then advised the meeting that in the matter of carrying charges on oil not taken within specified time of the contract, each and every council member had reported his practice, *and that these reports showed a uniform charge of one cent per gallon per month or fraction thereof* (R. 576).

Thus between December 3 and January 7 absolute uniformity of charge in this particular had been brought about through the agency of the Bureau.

Views of purchaser of oil with reference to effect of Bureau's activities.

The effect of the activities of the Bureau and of the conduct of the linseed oil manufacturers who were subscribers thereto upon prices of oil and competition in the trade is indicated by a letter written to the Spencer-Kellogg Company by one of its representatives and transmitted to the Bureau, and by it bulletined to the several members by market letter on July 16, 1919. In that letter the writer made the following observations:

> Now we find that the consensus of opinion among our buyers is that they feel that the price of linseed oil is made by one crusher and followed by the other crushers who are subscribers to this service.
>
> This they base on the fact that they have noticed recently that whenever one crusher came up with an advance or a decline the

other crushers who have representatives in Milwaukee have followed the advance or decline within a very short time.

One went so far as to state that he thought it would go bad with anyone allied with this service if he did not see fit to follow in line, and that also from his own personal observation he was now getting better service from the different representatives in that he got protection against an advance which had already been assured him from information received from the other crushers, and that he could always rely on one taking an order after he had information of an advance (R. 450).

Investigation by Department of Justice.

From an announcement made by Mr. Armstrong at the meeting of February 13, 1920, it appears that an agent of the Department of Justice called upon him on the previous Monday stating that a complaint had been made regarding the operations of the linseed oil manufacturers through the Bureau service, and that the Department desired to make a full and complete investigation of its operations and service to that end (R. 596). The members were, of course, thereafter cognizant of the fact that they were under investigation; and naturally the same uniformity of prices was not maintained thereafter.

INQUIRIES AND EXCHANGE OF VIEWS THROUGH MARKET LETTERS.

Advantage was frequently taken of that clause in the contract which provided that any subscriber, who had made a quotation to a prospective buyer that was not accepted, might advise the bureau of

his quotation, giving the details of its bid, and request the bureau to bulletin all of its subscribers, asking specific information regarding any quotation or sale to such prospective buyer by any other subscriber, and that the Bureau would immediately bulletin the other subscribers, and upon receipt of replies would compile them and circulate them among the subscribers so that each would have a complete report of the transaction. Such of the correspondence arising under this provision as was introduced appears in Government's Exhibit No. 11 (R. 337–606). Notwithstanding the great amount of this correspondence in the record, yet from the numbers of the market letters manifestly but a part of it was offered. So large a number of the letters are here cited and substance given because many of the inquiries and replies thereto are peculiar within themselves; and they show how persistently a member was pursued for but slight infractions of their regulations, and how greatly the members in conducting their business must have been influenced, not only by actual inquiries, but by the knowledge that they were liable to be called to account for the slightest deviation from the course of conduct mapped out by the Bureau and the council.

On October 5 the Midland Company wrote the bureau that on October 4 it sold to Cataract Refining Company a tank car of oil for October shipment at a certain price, but that on the 5th it had been asked to cancel the order, the purchaser claiming that it had received a quotation from Archer Daniels Co. of $1.63 (R. 337).

This communication was bulletined, and on October 7 Archer-Daniels Co. wrote the bureau that on October 3d it quoted Cataract Co. a tank of raw oil at $1.73 delivered at Chicago, but that it reported that it had bought the oil at two cents per gallon less than the quotation. This letter was also bulletined (R. 338).

All the manufacturers sent replies from which the bureau concluded that "it is evident that the business was placed outside of our list of manufacturers" (R. 353). This is illustrative of numerous inquiries through which it was ascertained that quotations on sales at a reduced price were made by other producers than subscribers to the Bureau.

On October 18, 1918 a wire from Spencer Kellogg Co., to wit: "Advise immediately details your last quotation on sale Patton Paint, Milwaukee" was bulletined to all the members (R. 340).

On the following day a report showing replies of all but two subscribers who were called delinquent was was circulated. These replies show exactly what each one of the reporting subscribers had done. The Midland Co. reported: "Sold Patton Paint yesterday, tank car, raw, $1.47, delivered Newark; hundred twenty barrels cooperage, $1.53, raw basis, direct shipment, delivered Newark; hundred twenty barrels, dollar fifty one, raw basis, cooperage, direct shipment, Milwaukee, all prompt shipment." To this report the bureau wired the Midland Co.: "Your sale Thursday Patton Paint Co. should have been immediately reported by wire; see contract, line 273; also line 291.

The fact that you reported this sale by letter only, when quotation and sale both should have been reported by wire, has resulted unfairly to other subscribers. Please give full explanation by letter entire situation" (R. 341–343).

The Midland Company then wrote more fully, and a communication explaining the matter was then sent to the several subscribers; and it was concluded that "the information now published entirely clears the transaction and shows that subscriber accepted the business in strict accord with his filed prices and that the entire correspondence could have been avoided had the future delivery been evident in the initial communications" (R. 345, 346).

On October 19, 1918, Ankeney Co. wrote the Bureau that their representative had on that date quoted the Letton Paint & Varnish Co. and that it replied that it had quotation from Spencer-Kellogg Co. at $1.50 for carloads November, which was three cents under the price the Ankeney Co. had quoted. It desired to know if the information was correct (R. 343). The Spencer-Kellogg Company, after having communicated with its Kansas City representative, replied that their reduction to $1.50 was not quoted to the Letton Paint & Varnish Co. until the forenoon of October 19th, and that "under the circumstances *our representatives in Kansas City have been unjustly accused*" (R. 348).

On November 5, 1918, Spencer-Kellogg Co. wrote the Bureau that on October 29 their representative reported that the Midland representative, while

quoting openly their advanced price, continued to protect the trade on a basis of $1.55 raw oil in cooperage, and that, notwithstanding the fact that several transactions had been booked at $1.66, sales made on that basis were voluntarily reduced to $1.55 on arrival of car (R. 351).

On November 8 the Midland Co. replied, that on October 29 and subsequent dates its Knoxville, Tennessee, agent was authorized to quote their regular prices; that no special quotation had been given on any recent date, and no sales had been reported since October 29 at less than their regular price; and that the statement that sales made at $1.66 were voluntarily reduced to $1.55 was incorrect, as no car had arrived in Knoxville since October 1 (R. 355).

On November 5 Spencer-Kellogg Co. wrote the Bureau that its representative had reported that the Archer-Daniels Co. was selling through its representative, the DeSoto Paint Manufacturing Co., spot oil at $1.53 raw basis, etc. whereas their price "as established through information as received from you, was $1.58, raw basis for warehouse delivery, or $1.56 carload lots, direct shipment" (R. 351).

On November 9 the reply of Archer-Daniels Co. was circulated in a market letter, which was as follows:

> It seems our agent did sell two barrels of oil on the basis of $1.53, as he states, even against our orders not to set a price. We inclose communications on the subject from which you can quote as you think best, *but we hardly think that agency will again vary from our instructions* (R. 354).

The representative in his letter stated that he would not have taken the order had it amounted to very much, "but I thought it best not to let one of our customers wander away for two barrels of oil, and a difference of two cents a gallon. Please advise me if I did right" (R. 354). Yet for this small infraction of the regulations he was given a severe reprimand, and his letter was circulated among all the subscribers.

On November 8, 1918 the Archer-Daniels Co. wrote the Bureau that it had received communication from its agency in New Orleans that while its price and the price of other agencies was $1.66 the price of the American Company was $1.64½. The Bureau in the bulletin of November 19th said:

> Will the American Linseed Company in particular and all other subscribers as well advise the Bureau promptly what price their agents in New Orleans were instructed to quote and quoted under date of November 15. This is a case where actual facts should be checked and if your records do not verify the contentions made by Archer-Daniels' agents,

then the matter should be checked by direct communications with their agents so that the replies would give complete and accurate details of all quotations made on that date (R. 357).

On December 2 the replies of the several members were bulletined, among them the reply of the American Company, which said that it was possible that they were in error in making a quotation to their St. Louis office November 15th. That office had wired for a price on fifteen barrels each month from Novem-

ber to March without designating point of delivery, and they replied they might sell at $1.61, which was the warehouse price. Their agents had since advised them that the inquiry came through the New Orleans office, and they quoted $1.61 f. o. b. St. Louis. They had since advised their St. Louis manager that *thereafter quotations for delivery in New Orleans from New Orleans local stock must be four cents over the St. Louis price*, but that he could make quotations for New Orleans, actual shipment from St. Louis, at the St. Louis price f. o. b. that point (R. 361, 362).

On November 22 the Red Wing Co. wrote the Bureau, that on the 20th it had made a quotation to Peaslee-Gaulbert Co. of Louisville, and not having heard from them they were interested in knowing whether or not they actually made a purchase on that day (R. 359).

The Hirst & Begley Co. replied on the 23rd that on the 21st they made a sale to that company at $1.59, their regular price, which from the replies appears to have been the same price submitted by the Red Wing Co., and also by the American Co. and the Midland Co., they being the only members which appear to have quoted (R. 361).

On December 4 Spencer-Kellogg Co. wrote the Bureau calling its attention to certain reports indicating prices quoted by subscriber No. 1 (American Company) in various zones, there appearing to be a difference in the reports of five cents a gallon in some cases, six cents in others and in one seven cents. One report also indicated a reduction in price in zone

6 of one cent under the price shown in another report; and the writer stated that they had never been notified of those changes until the confirming reports reached them (R. 363).

The American Co. replied on December 7 stating that after their telegram was dispatched advising change in price they made out their price list; and in checking they found that in previous reports the zone differentials were incorrect. They were corrected in the last report, but they did not think it was necessary to advise by wire; however "in the future we will report such as the above by telegram and hope that this explanation will straighten matters out" (R. 363).

On December 11 Spencer-Kellogg Co. wrote the Bureau asking that it ascertain as to the accuracy of a report that the Midland Co. had quoted a customer located in zone 3 on the basis of $1.48 raw oil and tank cars; stating that they were informed that such a quotation was made by that company's Pittsburgh representative, whose office was located in zone No. 2 (R. 364). On the same day the American Co. asked an explanation of the prices quoted by the Midland Co. to the Allentown Paint Manufacturing Co. of Allentown, Pa., or the Wilhelm Co. of Reading, Pa., on raw oil in tank cars, December and June deliveries at $1.48 per gallon, which differed one cent from the subscriber's published price in zone 3 (R. 364).

On December 19 the Midland Co. replied that their agent in Pittsburgh denied that he had submitted quotations in zone 3 on a basis of $1.48 per gallon

in tank cars, but stated that he had been making out some cards giving the Pittsburgh price at $1.48, two or three of which had gone to customers in zone 3 who probably by mistake thought the price applied to that zone (R. 367).

On February 4, 1909, Archer-Daniels Co. wrote the Bureau making the same complaint against the Midland Co. (R. 393).

On February 12 the Midland Co. wrote again stating that the agent denied having made any quotations at less than the company's published price, and stating that if subscriber No. 3 (Archer-Daniels Co.) would give particulars regarding the customer who reported having received lower price from the Pittsburgh agent they would make further investigation (R. 400).

On February 14 the Archer-Daniels Co. replied that their agent at Philadelphia reported that A. Wilhelm Co. had notified him that he had a price in Pittsburgh from the Midland Co. "*at a cent less than our quotation*" (R. 406). What the final outcome of the inquiry was does not appear.

On January 4, 1919, the Spencer-Kellogg Co. wrote the Bureau that it was reported that subscriber No. 11 (the Sherwin-Williams Co.) was offering to the District Sales Department at Cleveland re-sale oil at $1.55, the oil having been purchased from outside sources. And it was suggested that inasmuch as the oil was being offered by a subscriber, notwithstanding the difference in departments, it was virtually a change in the selling price, and should be reported through the usual channels (R. 370).

On January 8th Sherwin-Williams Co. wrote explaining that the district sales department bought the oil from a local brokerage concern at a less price than $1.55, at which it was sold, and stating further that their representative "explained this at the first or second meeting of the Association, that it was possible that our districts or divisions might have business of this kind as they have the power invested in them to purchase oil and sell it at any figure that they choose. It is understood that they always make a profit if possible. The linseed oil mill operating under the name of the Sherwin-Williams Co. has no jurisdiction over these districts or divisions and never has any oil to sell them, and if the linseed oil department would make a sale to any of our auxiliaries it would be made on the same basis as followed by other crushers; namely, the market price carrying with it the usual returns" (R. 372). In other words the Sherwin-Williams Co. even reported sales made by its oil mill to its paint and other departments.

On January 8th Spencer-Kellogg Co. wrote the Bureau that the Simmons Hardware Co. of St. Louis claimed to have bought oil on January 4th from a crusher's representative "at one cent better than our warehouse price of $1.56". The Bureau was asked to ascertain what the facts were (R. 371).

The replies were bulletined on January 15th, from which it appeared that none of them had made a sale of the kind mentioned except Archer-Daniels Co., who wrote that they had received an invoice from

their agent in St. Louis at $1.55 raw and $1.57 for boiled, *that they immediately telegraphed him not to sell below $1.56, and asked him why he had done so,* and that the agent replied:

> In the last few weeks we have sold Simmons Hardware Co. a few small orders on the basis of $1.55, as we were led to believe that Kellogg had sold them on this basis. We, however, have only their purchasing agent's word for this and have not heard of their selling to others at this price. We will hold our price firm at $1.56 until further instructions (R. 376).

The Archer-Daniels Co. further said they did not understand why the agent sold below the price given him, and that "we have given explicit instructions not, in any case, to vary from our price in the future, *and don't think there will be any further occasion for reporting oil sales at less than our market price* (R. 376).

On January 9, 1919, the American Co. wrote the Bureau stating that they would be glad if it would bulletin subscriber No. 6 (the Midland Co.) with a view to straightening out sales which were made for the week ending December 28th, and a list of the sales was given (R. 372, 373).

On January 4th the Midland Co. replied explaining that prior to December 28th they had erroneously included in their weekly reports only less than carload lots which were not reported in their daily reports, which weekly reports showed the actual price obtained for delivery from warehouse; but commencing with December 28th it included all sales in the weekly

report; and they understood *that the council had decided to use the price of oil in barrel carload lots as the basic price;* and they had therefore deducted three cents per gallon from the price of deliveries made from their warehouse (R. 376).

On January 24 Spencer-Kellogg Co. reported to the Bureau a conversation which their St. Louis representative had had with the purchasing agent of the Simmons Hardware Co. in which the agent had said that he might be able to buy oil at $1.46 to-day, the order not to be turned in for forty-eight hours. If it went down he got the benefit of the decline, if it went up he would get it at $1.46; and that he might buy a carload of oil to-day, the market being $1.46 raw and pay a premium of 1 cent per gallon, or $1.47, with protection for thirty days on any undelivered portion should there be a decline. And the Bureau was asked to bulletin the subscribers with a view of ascertaining if they knew of any such agreement (R. 380).

On February 5th a market letter was issued quoting at length from the answers of the several subscribers in which they all denied making any such arrangements and condemned any such conduct; and the letter concludes thus:

> We can believe that none of the council members can possibly have such an arrangement, as it manifestly is a practice which is detrimental to the best interests, not only of the crushing industry, but to the trade as well (R. 391–393).

In the face of such searching inquiry and the obligation upon the part of each company to state the facts it goes without saying that neither of them thereafter would dare make any such arrangement with a purchaser.

On January 28, 1919, the Midland Company wrote the Bureau that it had information from a customer that an agent of the Ankeney Company was offering oil *with the price guaranteed against decline*, and suggesting that it was such an unusual variation in "the usual terms of sale" that it should be reported as a part of the subscriber's price list (R. 383). On January 31 the Ankeney Company replied to the Bureau that their Kansas City agent had reported the error, to which attention was called, a few days previous and that, "They tell us that they promptly issued a correction calling attention to their error and to the article on which the guaranteed price applied. Our agents regret the mistake very much" (R. 387). Of course no member thereafter guaranteed against decline.

On January 29, 1919, Spencer-Kellogg Company wrote the Bureau that they were advised that the representatives of the Midland Company were offering oil on the basis of $1.39 in cooperage for January to April shipment, which was 5c below the Midland's published price for that zone (R. 385). On February 7 the Midland Company replied through the Bureau that their representative had offered some resale oil for account of one of their Cleveland customers and that "we have fully explained in our letter today to

the Smead Company the embarrassing nature of such transactions and that such a quotation places us in the position of *violating our service contract, and we have issued positive instructions to the Smead Company to discontinue such offerings in the future*" (R. 396–7).

On February 3, 1919, the Spencer-Kellogg Company wrote the Bureau that they had been informed by their Boston representative that the U. S. Gutta Percha Paint Company had, about January 15, bought a carload of oil from a representative of the Midland Company on terms of 1 per cent cash in ten days, *when the Midland's published terms were sight draft against documents*, and that they were also informed that the Acme Company, with whom the Boston agent of the Midland Company was connected, had been in the Boston market for some five years offering oil in small lots of five or ten barrels and "always at 1¢ under the prices quoted by all of the large crushers, at the time including Midland. In other words, the purchaser would get a quotation from any of the crushers and would then call Mr. Gale on the phone and he would sell them at 1¢ under the market," and the writer inquired what arrangement the Midland had with those people (R. 387–8). On February 6 the Midland Company replied through the Bureau that they had no selling arrangement with the Acme Company, and that that company received no protection from them (R. 395). On February 13 the Midland sent an additional reply stating that they had been informed by their Boston agent that it was not true that the

Acme Company was quoting prices 1¢ less than the prices of the crushers (R. 401). This inquiry shows how every arrangement of a crusher with every dealer was laid bare to all of its competitors.

On February 24, 1919, Spencer-Kellogg Company wrote the Bureau that they had observed from a sales report that Subscriber No. 1 (The American Company) had on February 8 sold 300 barrels in zone 3 at $1.43, which was 2¢ under their filed price, and inquired whether the price reported was correct, and if so, whether it was for export shipment, suggesting that if it was for export shipment "it was agreed by all subscribers to the Armstrong service that these sales should be reported as export sales" (R. 409–10). On February 27 the American Company replied that the sale was for export, and that "it was our error in not showing same on our daily sales report," and promised that in the future when making export sales they would show that fact (R. 412). This inquiry shows with what minute care the subscribers inspected all the reports of their fellow members.

On February 26 the American Company inquired through the Bureau of Subscriber No. 6 (Midland) for the details of a sale made February 19 of 60,000 gallons to the Standard Oil Company. The report showed it was made at $1.39 prompt direct shipment, and it was inquired what allowances if any were made for delivery (R. 411). On March 30 the Midland Company replied through the Bureau that the sale was made at $1.39 delivered at Long Island

City, and that if delivery were made in tank boats of the company an allowance of 7¢ per hundred pounds would be made for use of the boat and the cost of delivering the same from Edgewater to Long Island City (R. 416). On March 10 the Spencer-Kellogg Company joined in the correspondence about this sale inquiring whether the allowance of 7¢ per hundred pounds was in addition to the cost of delivering from Edgewater to Long Island City, and stating the reasons for the inquiry, and asking the Bureau to "please bulletin Subscriber No. 6 (Midland Company), as we are anxious to ascertain full details concerning the terms on which the transaction was booked" (R. 421–2). On March 14 the Midland Company replied to this inquiry that when the sale was made they assumed the allowance would be 7¢ per hundred pounds, which is the amount they had previously allowed the Standard Oil Company, but that after communicating with their New York office they had found that the allowance actually granted was the freight rate from Edgewater to Long Island City, or 15½¢ per hundred pounds (R. 426). Thus the minutest detail of this transaction was made known to all the members, when apparently in the beginning only the agent of the Midland Company who actually made the sale knew the exact allowance for freight that had been made the Standard Company.

On February 27, 1919, the National Lead Company wrote the Bureau stating that Subscriber No. 12 (Spencer-Kellogg Company) had quoted the Horn Company of Long Island City on or about February

4 a price of $1.44 for delivery in April, and suggested that the subscriber be asked to state what the facts were (R. 412). On March 8 the Spencer-Kellogg Company replied denying that they had quoted the Horn Company a price of $1.44, and stating that their New York representative had written them that he did not quote those people "any other price than our filed price at the time, which was $1.45 raw basis direct shipment," and further stating that "*we have at no time deviated from our filed price list*" (R. 419).

On March 4, 1919, the American Company wrote the Bureau quoting a letter it had received from one Currier, manager of the Hansen Paint & Glass Company of Sioux City, Iowa, to the effect that they had been offered oil on consignment from two different sources, and that in consideration of storing it in their warehouse they could take it out on the carload basis price, having the oil invoiced to them on the dates of their taking it out of stock, which would enable them to purchase the entire lot if they felt the price was going to advance, or they could take it at the carload market price as used; and the American Company asked that the subscribers be bulletined with the view of getting a report as to whether any of them had offered the Hansen Company that kind of a deal, and stated that its position was, that it would be silly in a town where they had a producing mill to allow competitors to make that sort of an arrangement with jobbers and not be able themselves to give them the same facility, because their terms then read 3¢ additional per gallon for delivery to trucks or drays at

mills or warehouses (R. 418–19). On March 17 a market letter was circulated giving the replies from eleven of the members, in which they declared they had no such arrangement. The reply of the Ankeney Company was published, which concurred in the views of the American Company in condemning any such arrangement. However, it appeared from the reply of the Midland Company that it was the offending party, and its defense was that the American company had an arrangement that was equally subject to criticism. The Spencer-Kellogg Company stated in its communication that "there is an important question raised here that should demand the careful consideration of all crushers, *and we suggest that this subject be a matter of discussion at the next meeting of the council members*"; and it was said by the Bureau, *"the subject will be docketed for discussion at the next meeting, as suggested"* (R. 429–31). On March 19 the American Company wrote the Bureau that it was not complaining of the arrangement made by the Midland Company, but was only trying to check up the basis on which "*it was made with respect to price*" and that "*as long as no deviation was made from their published price by the Midland Company without notice we are perfectly satisfied*" (R. 434). This is another illustration of how the details of every arrangement made by a subscriber was laid bare to the entire membership, and how uniform action in every particular was secured.

On March 7, 1919, the Spencer-Kellogg Company wrote the Bureau that they were informed by their

Baltimore representative that subscribers Nos. 3 and 8 (Archer-Daniels and National Lead companies) were selling oil in Washington at the same price that they were selling in Baltimore, making no extra charge for freight, while the writer and subscriber No. 1 (American Company) had been adding sufficient to offset the freight charge, and the subscribers mentioned were asked if that was not contrary to their filed price list (R. 420). On March 13 the American Company with reference to the same matter stated it was advised that the Midland Company also had been quoting Washington the same price as Baltimore, and that it was claimed that the representatives of the National and Archer-Daniels companies had been paying no attention to the trade acceptance feature of the terms of sale (R. 422–3). On March 28 the replies of Archer-Daniels and National Lead companies were bulletined, in which the Archer-Daniels Company said, "*Our agent has sold oil in Washington at our Baltimore price. We have instructed him to discontinue the practice.* He did it without consulting us." The National Lead Company humbly admitted, "*We are guilty, are sorry and have completely reformed.* * * * Some of the responsibility therefor rests upon the undersigned for not having as clearly defined our selling position to our representative there as should properly have been done. We repeat that, *during several weeks past our quotations in that market have been strictly in accordance with those filed with the Bureau.*" (R. 440.) Thus thereafter Washington purchasers had to pay

for oil the Baltimore price plus freight, instead of the Baltimore price, at which they had previously been able to procure oil.

On March 13 there seems to have been quite a flurry about conditions at Albany. Spencer-Kellogg Company wired the Bureau that they had reliable information that the American Company was meeting Kellogg & Miller (not a member) competition at Albany at $1.52, and the Bureau was asked to ascertain if that was correct. This wire was repeated to the American Company, which immediately wired: "Our published price Albany $1.53 warehouse delivery not selling under this." Spencer-Kellogg Company also wrote the Bureau on the 13th that their Albany representative advised that Kellogg & Miller Company was sending out quotations at $1.52, and that the American Company was positively meeting that competition, and had actually made a sale at $1.52 to Walker & Gibson, of Albany, and the Bureau was asked to ascertain whether the information was correct (R. 424). The Bureau requested the American Company to please reply relative to this specific case. On the 14th Spencer-Kellogg Company again wrote the Bureau with reference to the same transaction, and requested that they bulletin Subscriber No. 1, "as we are anxious to ascertain whether or not a consignment arrangement still exists between the subscriber and the customer in question, *whereby it would be possible for the customer to get an allowance of any kind that would make it possible for them to consider the purchase price of these*

five barrels at anything under the $1.53 price as published by said subscribers" (R. 425–6). On March 17 the American Company replied that the sale in question had been billed at $1.53 with no deductions, but they had taken it up with their Albany representative and requested Spencer-Kellogg Co. to ask Mr. Evans where he got his basis for advising competitors that the price was under $1.53 (R. 431–2).

On March 19 the Spencer-Kellogg Company again wrote the Bureau that their representative at Albany had advised that the same customer, Gibson, Snow Company, Mr. Evans buyer, had purchased another five barrels from the American Company at less than its published price, and closing *"Under the circumstances we anxiously await a report from the subscriber in question. Please give this matter your immediate attention"* (R. 433). On March 19 the American Company further replied that the representative of the Gibson Company had stated that he could buy oil in less than car lots at $1.52, but denied that he had said that it was the American Company that was making a price less than $1.53 (R. 435–6). On March 22 the American Company wrote the Bureau: "Please be advised that on the 5 bbls. which Mr. Evans, the buyer of the Gibson, Snow Company, claimed he could buy from us at a better price than $1.53, upon our representative reporting that he had sold this 5 bbls. at $1.53 freight allowed, Rochester, *we immediately wired him that this could not be done, and received word in the mail this morning that the order had been canceled. We hope this clears up the*

matter now to the satisfaction of Subscriber No. 12" (R. 437–8). Thus the stability of the market at Albany was saved; and the cancellation of the little transaction of five barrels whereby a purchaser would get the advantage of a cent or two per gallon was secured.

That every special arrangement with purchasers made by each subscriber was revealed to all is further shown by the report of the American company on March 17 of a special arrangement with W. P. Brewer of Birmingham for an allowance of $1 a barrel to cover all charges for storage, drayage and selling commission; and also by a report of Spencer-Kellogg Company on March 18 of a special arrangement with Starkweather & Williams Company of Providence, R. I., for the handling of oil on a consignment basis whereby that concern was to receive 50 cents per barrel commission to cover all charges for storage, drayage and selling commission (R. 432).

On March 27 Spencer-Kellogg Company wrote the Bureau that it was reliably informed that Subscriber No. 6 (Midland Company) had sold ten barrels of oil for shipment from their Syracuse stock to the Columbia Mills, Minetto, N. Y., at a price of $1.53, when it was their understanding that the last published price list of said subscriber filed did not include freight on shipments to other points. On March 28 Spencer-Kellogg Company again wrote the Bureau that it had been advised that the same representative of the Midland Company had, not only quoted, but had actually sold oil for delivery at

Minetto at their published price of $1.53 zone 3, absorbing the freight on shipment made from Syracuse stock, and that they had also been advised that the same representative had assured a concern in Syracuse that they could deliver oil from Lockport at $1.53 shipment to be made from their Rochester stock, notwithstanding the fact that the Rochester warehouse price was $1.53 and that freight charges of more than the equivalent of 1¢ per gallon were involved (R. 441–2). The Midland Company on April 8 replied to this and other communications relating to the allowance of freight, that they were made through a misapprehension regarding the application of zone prices; that it had never been the company's practice to sell oil in less than carload lots with freight allowed; that "this company has never authorized its Pittsburgh or other agents, at any time in the past, to sell on this basis. *Consequently when the linseed crushers' council passed a resolution at its January meeting limiting the application of zone prices to points where warehouse stocks are carried* this office did not feel that it was necessary to notify its agents generally of this resolution"; and that "We very much regret this error on the part of our Pittsburgh agent *and have taken the necessary steps to prevent any recurrence of incidents of this kind*" (R. 445–6).

On July 30 Archer-Daniels Company wrote the Bureau that for a number of years they had been doing business with Bradley-Wise Co., of Los Angeles, who had been rather slow, and they had thought that the 30-day trade acceptance plan would solve

the problem with reference to that and similar companies; that on the previous day they had received a letter from their agent at Los Angeles in which he stated that acting under directions he had notified the Bradley-Wise Co. that they would either have to discount or send in a trade acceptance, but that later Spencer-Kellogg Company wrote them a letter stating that they would be pleased to sell them oil without the use of the trade acceptance and giving them terms of 30 days net cash; and the Archer-Daniels Company further said that it was their understanding from the expressions made at the meeting of the Bureau on March 27, 1919, by Subscriber No. 12 (Spencer-Kellogg Company) that it was interested in maintaining the 30-day trade acceptance wherever possible; that it seemed to them that Subscriber No. 12 had used in that case the writer's maintenance of the "30-day trade acceptance" position as a lever to swing business his way, and all council members were urged to maintain the 30-day trade acceptance (R. 452–3). On August 14 the replies of three members to this suggestion were published, all of them being favorable to the trade acceptances and two stating that they had actually enforced them, but the other had not yet apparently had occasion to insist upon their enforcement (R. 457–8). On August 20 the Midland Company wrote the Bureau that it believed the enforcement of trade acceptances was desirable, but that it was difficult for the crushers who carried retail accounts to make a general application of them; and

it thought it advisable that the crushers council should determine in what classes of trade it was practicable to enforce the trade acceptance terms and what measures should be taken for their enforcement, and that "*If then each subscriber will follow the definite procedure recommended we believe more progress will be made in this direction*" (R. 461). On August 20 the American Company wrote the Bureau that it had adopted trade acceptances to a considerable extent before the organization of the bureau and that it had since made universal the adoption of the 30-day net trade acceptance terms and were gratified with the results (R. 462.)

On August 7 the American Company wrote the Bureau commenting respecting a sale wired that day by the Archer-Daniels Company made in zone 3, through a misunderstanding, at 5¢ under their filed price. It appeared also when another market letter was received that there was another case of error by the agent of the same company in a sale made in zone 3; and it was said: "Seriously, we think the action of their agent should be criticised and so far as we are concerned, *if it is demonstrated that it was their New York agent who had made this mistake, we would like* [*to*] *have some further statement from the Archer-Daniels Company as to the frequency of similar happenings in the future*"; and a previous letter of that company upon a similar matter was criticized (R. 456).

It was commented in the market letter in which the American Company's letter was bulletined that, "The Bureau feels that Subscriber No. 1 (the Ameri-

can) is entirely justified in his viewpoint * * * and that a full explanation is forthcoming from Subscriber No. 3 as to the sale in question, *and also that all council members are entitled to know what steps have been taken by him to prevent a recurrence of such mistakes*" (R. 467). The record does not disclose what reply the Archer-Daniels Company made to this inquiry; but the inquiry and the comments by the Bureau show how serious a matter it was for an agent of a subscriber to make a mistake, and especially two mistakes, of a few cents variation from the filed price, and how a company was liable to be called upon the mat because of such mistake.

An explanatory letter from Spencer-Kellogg Company to the Bureau dated August 13, 1919, from which it appeared that its Portland, Me., supply of oil was stored by its representative in a building owned by a customer, is also illustrative of how every act which might be regarded as a deviation from the prices and terms of sale filed with the Bureau is checked up and further deviations prevented. The writer insisted that such arrangement gave them no advantages, but, it said, "on the other hand, we are perfectly willing, for the sake of harmony, to effect other storage arrangements in Portland, *and have therefore notified our Boston representative to instruct Mr. Massure to obtain other storage facilities immediately, notwithstanding the fact that we feel that we are the victims of pernicious activity on the part of a subscriber's representative.*" The Bureau's comment upon the con-

troversy, which appears to have ended with that letter, is as follows:

> We believe this entire controversy which is now unselfishly settled by the parties in interest can be provided against in the future by the Bureau's plan of education direct with our agents and representatives. In other words, had the representatives of the companies in conflict on this matter been thoroughly imbued with the spirit of fair, friendly competition, it is undoubtedly certain that such a situation would never have developed. (R. 458–9.)

On August 29 Mr. Quine of the American Company wired the Bureau that their Detroit agent advised that the Archer-Daniels Company had sold and delivered oil to Woodison Company on the previous day at $2.14, while their filed price zone 2 spot and August was $2.24 warehouse. This was relayed immediately to the Archer-Daniels Company. On the following day Spencer-Kellogg Company wired the Bureau that they had reliable information that Archer-Daniels Company was quoting openly basis $2.10 September shipment zone 2, whereas the last price list reported $2.11. This also was wired immediately to the Archer-Daniels Company. On the same day the Bureau wired Archer-Daniels that it was necessary for them to look into the matter and give further detailed advice, "as reports from the Detroit territory seem to clearly indicate that there have been unreported deviations from your last filed price list in that district" (R. 464). On Septem-

ber 1 the Archer-Daniels Company wrote quoting the previous correspondence, and adding that as they had a letter from the Detroit agency under date of August 28 giving no information of any Woodison business, "we can not imagine that they have sold or delivered any oil to Woodison at $2.14." On the 2nd the Bureau replied:

> We have your letter dated September 1st, which is being published in market letter No. 717 to-day, and while we note that your last transaction with Woodison, of Detroit, was a sale on July 24th, the case reported in market letter No. 712 seems urgent enough to warrant your specific communication with that agent, and we would therefore suggest that you communicate with him at once *and secure the direct information as to the particular sale reported.*
>
> You can readily understand that where a direct question is asked as to a quotation or sale in any territory it is hardly satisfactory to the inquiring subscriber to be told *in a general way that no sale has been made in that region without direct reference to the persons who would be responsible for such a sale.* Your Detroit agent (or, for that matter, the agent of any subscriber) might, *through a slip, fail to report a sale, as such cases as you know have occurred in the past. That is why the bureau must request in every case where a direct question is asked that a direct reply, based on facts secured from responsible parties, be made.*
>
> Will you kindly go into this matter fully and *let us have your detailed report with the least possible delay?* (R. 467.)

The Archer-Daniels Company made further specific inquiry, and it was reported by its agent that it had made no such sale (R. 472). But the correspondence illustrates how searching was the examination into every supposed infraction of the rules of the Bureau.

On September 2, 1919, the American Company wrote the Bureau that its Indianapolis representative had reported that both Archer-Daniels Company and the Ankeney Company were quoting at $2.13, and that the Archer-Daniels Company's agent had informed him that rightly the price of $2.13 should *go into effect the following Monday, but that as very little spot oil was being bought he was quoting that price to the trade without any clauses* (R. 471). On September 12 the Archer-Daniels Company replied to the Bureau quoting a letter from its Indianapolis agent to the effect that the quotation at $2.13 was for September, which was the filed price at that time and that they had adhered strictly to the prices, and in no instance had they quoted lower than instructions (R. 478). It appears to have been developed, however, that some small sales of oil had been delivered by some of the companies during the latter days of August at the September prices, and considerable correspondence ensued, some of which is in the record. Quotations from a number of letters were bulletined on September 24, in which the American Company was quoted as having written that "it has been demonstrated that Indianapolis deliveries were made in August of oil at prices which were being quoted for September. *We think this a very bad practice and are entirely in*

accord with the position taken by Subscriber No. 12" (Spencer-Kellogg Company). The Ankeney Company wrote that their agent at Indianapolis had made deliveries of two barrels in August at the September price, "meeting a price that he was dead sure was made by the representative of another mill," but he had no instructions from them to do such a thing, and that, "*This agent has since received instructions to stick strictly to our prices which we give him from time to time and to first report to us any lower quotation that he may be advised of.*" The Goodrich Company declared that they had adhered strictly to filed prices, and that "we are taking this opportunity to again call the attention of our agents to this matter *and have issued instructions to them that this policy be rigidly enforced.*" The bulletin contained the replies of twelve members, all of whom declared that they were strictly enforcing the rule, or that, if any agent had previously deviated, he had been specifically warned not to do so again (R. 482–485).

Along the same line was a letter written by the Ankeney Company to the Bureau on September 6, 1919 (R. 475), in which it was said that their Kansas City agents had written that the Swan Manufacturing Co. was in receipt of an invoice covering a barrel of oil delivered under date of August 27, at which time the Swan Company had a price from Abner Hood Chemical Company of $2.13 per gallon. Their agent had told the Swan Company that he would take care of them at the same price, and the order was reported to the home office without the notation to hold up

billing until September, and the agent asked that a corrected invoice on the basis of $2.13 per gallon be sent to the Swan Company; and the Ankeney Company stated that they were withholding the corrected invoice until they could get a report from the Kellogg Company as to their price at Kansas City on August 27. On September 11 the Bureau made the following reply to the Ankeney Company:

> Although the bureau has duly published your letter above referred to, Mr. Ankeney, *the writer cannot help but take very great exception to the weakness of your sales policy as exemplified by that communication.*
>
> *You will see at once that if we permit our agents to meet our competitors' prices and back that policy with the support of our chief executives, as is evidently true in your proposed plan of procedure, we are just naturally taking the backbone out of our sales force and substituting a rubber composition.*
>
> One of the very decided returns from this service is the development of individual thought and action giving to each manufacturer and merchandiser that all important accurate market information which enables him to place his own valuation on his merchandise and his merchandising ability, and that you will admit is ideal business.
>
> If on the other hand any subscriber to this service is using this market information as an actual means, if not an actual incentive, to do as the other fellow is doing, then we are indeed failing in our purpose with that subscriber of instilling this all important principle, as I have stated.

> The great trouble to-day with American business and labor is that we lack independent thought and action, and we venture this letter, which we will also publish to the council in the hope that you will fully subscribe to our views and will further support this principle by conveying this independent action idea not only to your Kansas City agent but to all those who represent you who may at once show this same disposition (R. 476).

Spencer-Kellogg Company wrote the Bureau on September 12 at considerable length about the transaction, stating that their records conclusively showed that they did not quote or sell any oil for delivery from the Kansas City warehouse during the month of August at prices that did not conform to their price list for that month (R. 477–8).

The comment of the Bureau with reference to "independent thought and action" is, to say the least, curious. Ankeney Company had agreed through the Bureau with its competitors not to deviate from its filed price without filing another one. It finds a competitor probably delivering some small quantities of oil the very last of August at September prices. It was not, according to the Bureau's idea, "independent thought and action" to meet that competition, but it was "independent thought and action" to servilely adhere to the orders of the Bureau.

On September 30, 1919, Spencer-Kellogg Company wrote the Bureau that during the latter part of the preceding week Subscriber No. 6 (Midland Company)

made a sale to Pratt & Lambert of Buffalo at $1.65 per gallon, when their price was $1.66 at Buffalo (R. 492). On October 4 the Midland Company replied that it was not true that it had made such a sale; that the facts were their agent had wired that he had sold Pratt & Lambert four cars of oil, and that they had wired the agent that the sale had been entered at $1.66, and upon being advised that the order had been entered at $1.65 they refused to accept the business at less than $1.66, and as Pratt & Lambert did not confirm the purchase at that price the order was canceled, "*we not being willing to cut our price or to make up the 1¢ difference in any indirect manner*" (R. 493).

On October 10, 1919, Spencer-Kellogg Company wired the Bureau that it was reliably informed that representatives of Archer-Daniels and Midland Companies were openly quoting (at St. Louis) for January delivery at warehouse $1.58, and requested that the Bureau "*wire both subscribers immediately and wire quick.*" This was immediately relayed to Archer-Daniels Company (R. 497). Midland Company replied the same day that its St. Louis price was $1.59 direct, $1.62 from stock, and that it had not authorized any lower price. The same day, the Archer-Daniels Company replied that it had wired the Bureau the day before at 10:30 that its price for January-September was "one fifty-none" [nine] in zone 1, to which the Bureau replied that it had published the wire referred to, but that did not give the requested information, and asked that it be advised further by

wire. Archer-Daniels Company replied that its representative had advised the Bureau the day before that its January–September price was "one fifty-none" [nine], and the Western Union claimed that it delivered the message at 10:41; and on the following day (October 11) it wired that its representatives all wired Wednesday morning to quote $1.60 January–September, zone 1 basis. On the same date the Bureau wired Archer-Daniels: "Your telegrams promptly relayed to all. *Please reply specifically our wire tenth.*" On the same date Archer-Daniels replied: "Morning October nine quoted October–November–December $1.70, January–September $1.59, zone 1." Three other telegrams passed between the Bureau and the Archer-Daniels Company; and the Bureau then wrote the Archer-Daniels Company requesting full supplemental details by letter, and added, "The above exchange of telegrams emphasizes the need for direct and complete replies to all inquiries which the subscribers elect to send through the Bureau (R. 499). On October 13 the Archer-Daniels Company after communicating with its representative at St. Louis quoted the reply received, and also in a postscript quoted a wire to the effect that "we have not quoted or sold any oil less than your wire instructions on October 10th or any other date" (R. 500–1); and on the 17th it sent to the Bureau a copy of another letter from its representative at St. Louis denying that it had made any sale at the price mentioned (R. 503). Thus the tempest of wires seems to have found its birth in

some one's fertile imagination, for there had been the strictest adherence to prices; but the Archer-Daniels Company was guilty of not at first choosing the most positive and precise words in denying it.

On October 11, 1919, Spencer-Kellogg Company wrote the Bureau stating that they had been advised that a representative of the Nationa Lead Company had sold the Union Petroleum Company at Philadelphia on October 9 twenty barrels each for November and December, at $1.75 for November and $1.65 for the December delivery, when the list price was $1.72 direct shipment, or $1.75 for warehouse delivery for November and December (R. 500). On October 20 the accused replied to the Bureau stating that "We regret that the facts are about as stated by Spencer-Kellogg & Sons," and then quoted from a letter it had received from its Philadelphia representative, in which it was admitted that to sell the oil at that price for December was wholly erroneous, and they could offer no explanation further than that they had just previously been quoting for December and later months at 10¢ per gallon under the November price (R. 504).

On October 18 the Archer-Daniels Company wrote the Bureau that their Baltimore representative had written them that Spencer-Kellogg was offering oil for January at $1.60, when their filed price was $1.61 (R. 502–3). On October 22 Spencer-Kellogg replied at length, blaming the trouble upon the telegraph company for badly mixing up the code

words, as a result of which an offer was made in the Richmond market at the Baltimore price, and stating that when that was ascertained, the agent was immediately telegraphed not to enter the order, but "it developed that we were committed beyond question"; and just as soon as the situation was cleared the transaction was reported by letter. The writer adds: "We later succeeded in making satisfactory explanations to all of these buyers who were kind enough to allow their purchases to stand at prices that were incorporated in our original wires" (R. 505).

On October 28 the Archer-Daniels Company wrote the Bureau reciting certain correspondence which had passed between that company and the Spencer-Kellogg Company, and requesting that the Spencer-Kellogg Company be asked to investigate as to whether their agent at St. Louis was quoting less than their listed prices on or about October 24 (R. 508). On October 29 the Spencer-Kellogg Company wrote that they were writing their representative at St. Louis to report, but expressing the opinion that there was some mistake about the matter (R. 512). On November 3 Spencer-Kellogg Company wrote that their St. Louis representative had reported that all of its quotations had been in strict accord with the filed price list, and asking that the Archer-Daniels Company name the source of its information with full particulars, "as we are exceedingly anxious to go to the bottom of this alleged infraction of instructions" (R. 516). On November 17 the Archer-

Daniels Company replied through the Bureau quoting from a letter they had received from St. Louis to the effect that the information came from two or three different sources upon which they could absolutely depend (R. 527). On November 24 the Spencer-Kellogg Company again replied stating that it had received another letter from its St. Louis representative denying absolutely that he had made any quotation under prices, and stating that it would give him pleasure to be taken to the customer or customers who made the report that the representative had quoted them prices under schedule as filed (R. 535–6).

This instance is cited to show with what persistency an inquiry into an alleged infraction of a regulation was pursued; and to what extent members would submit to examination though in effect accused of making false statements. This is further illustrated by the incident next cited.

On October 28 Spencer-Kellogg Company wired the Bureau that their Atlanta representative advised that Subscriber No. 6 (Midland Company) was quoting small lots from warehouse at their filed price covering carloads direct shipment (R. 509). On the same date the Midland Company wrote confirming its wire that the complaint was correct, and that "the price was quoted by mistake," and that "*we have wired a correction immediately. We thank you for calling this matter to our attention,* as we had not discovered the error until looking the matter up after receipt of your telegram" (R. 509–10).

On November 10 Spencer-Kellogg Company wrote the Bureau that it had reason to believe that James Forrester, of Pittsburgh, a representative of Subscriber No. 6 (Midland Company), had quoted various jobbers throughout eastern Pennsylvania by wire in the afternoon of November 7, offering oil at $1.50 for January shipment, and asked particularly whether quotations or sales were made to Lewis & Bennett Hardware Co. at Wilkes-Barre, Pa., and Louis C. Thompson, Pottsville, Pa., at a price of $1.50, requesting the subscriber to furnish exact facts (R. 521–2). On November 13 the Midland Company replied that they had advanced their price on November 7, sending out the first telegram at 3.30 and the wire to the Bureau at 3.33 (The Bureau made a note that the time given in the telegrams received by the Bureau and confirmed in quotation report was 3.45); and that the balance of the telegrams to agents were sent out as fast as they could be written up to 4.15, and consequently that Mr. Forrester probably did not receive notice until after the close of business (R. 523). On November 15 the Midland Company wrote the Bureau that they had just received advice from Mr. Forrester that he did not make any sales after receipt of their message of November 7 advancing the price; that he received the message at 8.47, it evidently having been delayed, as it was sent not later than 4.15 p. m. (R. 524–5). The Midland Company again wrote, on November 18, that Mr. Forrester had advised them that he had quoted Lewis & Bennett Hardware Company and

Louis C. Thompson at their regular filed November prices but did not receive an order (R. 527–8). On November 22 Spencer-Kellogg Company asked that the Midland Company "*bulletin the exact wording of the telegrams as sent by their Pittsburgh representative to the Lewis & Bennett Hardware Company, of Wilkes-Barre, Pa.; Louis C. Thompson,* of Pottsville, Pa.," suggesting that "*in this particular case the mere mention that these quotations were made on the basis of price list as filed November 6 is not a satisfactory answer to our inquiry*" (R. 533). On December 2, 1919, the Midland Company's reply to this letter was circulated, with which was enclosed copies of its wires to the two concerns mentioned, and it was suggested that the previous communication should have been regarded as satisfactory. This appears to have closed the matter, but the correspondence shows how impossible it was for a member to evade giving complete details of every transaction.

On November 12, 1919, the Northern Company wrote the Bureau that on November 6 they had quoted the Soo Line railroad their filed price of $1.75. They were subsequently advised by the Soo Line that it had purchased the oil at $1.72, "and upon taking up with the people making this quotation they admitted the mistake but stated that their quotation would stand and they made no effort to withdraw"; and the Bureau was asked to ascertain who made the sale (R. 523). Inquiry revealed that the sale had been made by the Midland Company, who stated that it was made by mistake which was not

observed until the order had been accepted, and they could not withdraw. It was added that "We did, however, explain that a mistake had been made in quoting them at the price stated, and *assure you that the mistake was unintentional and regret having made it.*" The Bureau commented, that "since this sale was a deviation from the above subscriber's price list as filed with the Bureau and should have been reported as a special sale, no doubt the subscriber in question will wish to explain the omission" (R. 529–30). On November 29 the Midland Company repeated the explanation previously made, and stated that "this was entirely unintentional, and among a very large number of items this discrepancy was overlooked" (R. 538).

There had been some correspondence about a special allowance on a sale made by the representative of the American Company at San Francisco. On November 24 Spencer-Kellogg Company wrote the Bureau that it had been informed by its representative at San Francisco, that one of the largest buyers in the territory was responsible for the statement that the representative of the American had been allowing the customer previously mentioned 5¢ a gallon when he furnished his own empty oil barrels to be filled at tank stations maintained by the subscriber (R. 534–5). On November 28 the American wrote the Bureau that they had taken the matter up with their representative, and said: "*I have very plainly advised him that a practice of this sort must not be continued if he has been doing it*"

(R. 541). In a supplemental reply of December 18 the American Company further said, that it was glad to say that "we do not allow contract or other customers to send their barrels to our tank stations and give them a differential of 5¢ under our warehouse price or direct shipment price for oil in customer's own containers. *This question was brought up recently through the Bureau* on an inquiry from the Spencer-Kellogg Company, as we remember, advising that their agent in San Francisco had reported that we were doing this at that point. Our San Francisco agent denies granting any such privilege and our records do not divulge deliveries on this basis. * * * We think it is entirely wrong, and certainly buyers are not entitled to our bulk differential on oil delivered in this manner" (R. 554–5).

On December 8 Spencer-Kellogg Company wrote the Bureau that their representative at St. Louis had advised them that on December 1, at the request of a certain company, he had quoted them $1.78 January-February-March, and $1.63 for April; that he was subsequently advised that an order for 800 barrels was placed with Subscriber No. 1 (American Company) at $1.78 January-February, $1.73 March, and $1.63 April, when that subscriber's last filed price was $1.70 for March in zone 1 *if taken in equal quantities in connection with April and May,* and it was suggested that the sale was not in accord with the filed price, *as it did not appear that the customer purchased for both April and May* (R. 544). In its reply of December 18 the American said that:

The irregularity of this sale was overlooked when reported to this office, as Mr. Quine had left for Chicago to attend your meeting. We have written to our St. Louis office advising that they exceeded their authority in making a sale of this kind, i. e. selling March at our March price *without including April and May* (R. 552).

Thus slight deviations of this character were guarded against in the future.

On December 18 the Archer-Daniels Company wrote the Bureau that their Richmond agent had advised them that the American Company had a tank station situated on the C. & O. Railroad, and had made the rule that buyers of carload lots would have their goods placed in a car and switched to the buyer's siding or to the railroad delivery tracks, and a car could be loaded and switched to almost any part of the city within twenty-four hours after receiving an order, and if it were loaded say on the 15th they would bill the goods *dating the invoice the 16th, the date the goods were actually delivered, and allowing a 10-day discount period from this date.*" It was further said that "As we understand it, *subscribers have passed a resolution at a previous meeting of the Armstrong Bureau that such an arrangement* [delivering by carload lots] *was to obtain only in mill towns,*" and inasmuch as Richmond was not a mill town the writer wondered if the American would not advise their agent there that he could not make deliveries from warehouse at carload prices. It was further suggested that the

American's terms were 30 days cash, or 1 per cent discount if all was paid for within 10 days after date of invoice, and that the invoice should be dated on the day the shipment was actually made (R. 557–8). On December 27 the American replied: "We have written our representative at Richmond to-day advising of the complaint by the Archer-Daniels Company and said to him that if he has been allowing any such privilege in Richmond as a delivery of a full carload from local stocks either by switching full car lot from our tank station to buyer's siding or railway delivery point, or delivering a full carload within 48 hours at our car-lot price, *he is to immediately cease.* I have also advised him that our terms are 30 days net, or 1 per cent for cash in 10 days, and that date of the invoice is the date of shipment from our mill or tank station and not date of delivery to buyer" (R. 561); and on January 3, 1920, the American further wrote that its representative at Richmond admitted that he had made car-lot deliveries at car-lot direct shipment prices, claiming that he was authorized to do so in a verbal conversation, and the writer added: "We are not clear on this matter; but you will please be advised that we have given orders that this practice shall not be continued, but that car-lot deliveries in Richmond must be made by direct shipment and not from local stocks" (R. 571).

There had been considerable correspondence between the Bureau and the American Company with reference to allowing a discount for customers who

furnished their own barrels, and on December 23 the Bureau wrote the American Company suggesting that it make further reply concerning the question, and on December 27 the American Company wrote the Bureau that it was writing their manager at San Francisco "asking him to make a categorical reply to the question which I have several times asked him as to whether or not he has been making a practice of allowing customers a 5¢ differential where the customer brings his own barrels to be filled" (R. 559–60). On January 14 the American Company further replied that it had received a wire from the San Francisco representative stating that he had checked their records as far back as 1918 and could find no instance where such an allowance had been made (R. 574). This correspondence indicates that no member was making such an allowance, as otherwise the Bureau would have been after him.

On December 30 Goodrich Company wrote the Bureau that on the previous day they wired a price of $1.71 to Studebaker Corporation, but it replied that it had been quoted a better price; and the Goodrich Company asked that it be ascertained who had made the quotation (R. 563). The replies were bulletined by the Bureau on January 13, and it was stated that it appeared that the sale was made by subscriber No. 12 (Spencer-Kellogg Company), which company had written that it had sold Studebaker Corporation a January shipment at $1.71, the quotation having been originally made at $1.70, forgetting

that South Bend was in zone 2, but the price had later been changed to $1.71 (R. 573). On January 14 Goodrich Company wrote that it felt a fuller explanation should be forthcoming from Spencer-Kellogg Company, and asked full details of the transaction (R. 574). On January 19 Spencer-Kellogg Company replied that on December 30 they received a wire from their Chicago office stating they had sold the Studebaker people one tank of oil January shipment at $1.70 in tank cars, and that "We immediately replied that these people were located in Zone 2 and that we could not enter their order as wired and asked if we could enter it at our zone 2 price", and that they then got in touch with the Studebaker Corporation and received permission to enter the order at $1.71 (R. 577–8). This increase in price unquestionably resulted from the agreement among the members as to zone differentials.

On January 24 with reference to the same matter the American Company wrote admitting that its manager at Chicago had made a similar mistake in a quotation, the manager having written them that—

> Investigation discloses a price of $1.70 was made on this inquiry, which error was not discovered until the day following. Inasmuch as they had not accepted, and the quotation being for immediate acceptance, Mr. Johnson did not feel it necessary to revise the quotation. *It is unfortunate it happened. However, as it did not lead to business no harm was done other than having to admit to the Bureau we are the guilty parties* (R. 580).

On January 9 the Midland Company wrote the Bureau that it was informed that a representative of the American Company had made deliveries of oil in December to the Columbus Varnish Company, *applying such deliveries on their January sales,* and asked that the American Company be bulletined regarding the truth of the statement (R. 572). It appears that after two replies had been made by the American the Midland Company again wrote, on January 28, stating that the American Company had only denied that it had made a sale to the Columbus Varnish Company recently, but had not stated whether their representative had made such a sale, and that it was, therefore, obliged to assume that the statement made by the Columbus Varnish Company that the American Company's representative had delivered oil to them in December applying the same on the January contract was correct (R. 588). On February 2 the American Company replied that it had not previously understood just what Subscriber No. 6 (The Midland Company) "was getting at," but it was then writing its manager to obtain the information asked for (R. 592). On February 11 the American Company further wrote that their Cincinnati manager reported that their representative at Columbus had made a contract with the Columbus Varnish Company for January-May, and did oblige that customer in December with one lot of oil, invoicing it on the January contract price, which was below their prevailing spot December price, and adding: "Our manager advises that he must apologize for the Marietta in this in-

stance, as they were not familiar with our rule on this point, *and he has their assurance now that they will not anticipate deliveries in the future,* especially where there is a spread in price between spot and contract (R. 595–6).

It appears that in a meeting when the round-table was in order Mr. Goodrich asked Mr. Quine of the American Company with reference to their representative in Chicago making cartage allowance on full carload deliveries; and on January 15 the American Company wrote the Bureau advising that they had asked their Chicago representative "to make no cartage allowance on full carload deliveries where same is made in a car at the siding of this concern, but that if we make the delivery from local Milwaukee stocks of a carload within forty-eight hours we shall make them a drayage allowance *just as Goodrich Company do.*" (R. 577.)

On March 15, the American Company wrote the Bureau that their Baltimore manager on March 11 had advised them that the Mann Bros. representative in Baltimore "had about two cars of English oil on hand which he was offering at $1.70 in 5-barrel lots," which was not in accordance with the Mann Bros. price filed for that territory, "and we are wondering if they understand that their recognized agents are not to have the privilege of buying and selling oil from outside sources at under the file price of their principal" (R. 602). On March 19 Mann Bros. Company replied: "We were not aware that W. B. Cassell (their representative in Baltimore) was handling any

English linseed oil, and will immediately investigate the matter and *see that this procedure is at once discontinued, if so*" (R. 603). So, English oil at a reduced price was thus kept off the market in Baltimore.

PARTICULARITY AS TO EXACT LANGUAGE USED IN REPORTS.

That the subscribers really understood that they were by agreement maintaining prices and observing practices, but that the Bureau, while realizing that fact, endeavored to suppress evidence of it and to induce the subscribers to believe that, while they were in fact doing so, yet there was a thin border between their actual conduct and unlawful acts, is shown by the great particularity of the Bureau as to the exact wording of correspondence and by the language at times used by members, unconsciously indicating just what they understood the situation to be.

On September 20, 1918, at the beginning of the organization of the crushers, Mr. Armstrong sent a market letter to the trade in which, among other things, he said:

> When the service is well under way and you are receiving quotations representing the prevailing market prices for linseed oil, cake, or meal, do not make the mistake of referring to the market as "the price," for, although such a reference would be understood in its proper interpretation by the bureau and your fellow subscribers, it nevertheless savors of a uniform or an agreed price,

> or might be so construed. Therefore the bureau will not handle any communication making such references. You may refer to the prevailing market prices if necessary, but it is much better to confine your reference to "our prices" and "their prices" in every instance (R. 335).

How strictly this suggestion was enforced appears from a number of letters written by the members to the Bureau which were returned because of legal exceptions to the language used. On May 17, 1919, Nolan, manager of the National Lead Company, wrote the Bureau about two sales made by its Baltimore agents, which sales were not in strict compliance with the Lead Company's price. It was said that:

> Archer-Daniels having brought this matter to our attention served the purpose we assure them and all concerned of our Baltimore agents now fully understanding what they are to do and what not to do in connection with future sales of linseed oil in half barrel lots. Our price premium is 5 cents per gallon and no variation or deviation therefrom without authority from the proper source.

This letter was returned with suggestions that such phraseology should be used "that the operations and intent of the service can not be misunderstood," and that "*you need not state at any time your reasons for changing your prices to the trade*" (R. 607–8).

On July 10, 1919 Mr. Quine of the American Linseed Company wrote a letter to the Bureau in which he spoke of having at times to report sales the day

after they had made a "change in *the* price," and mentioned a price at which the Archer-Daniels Company sold a consignment in zone 3, asking that the Bureau "bulletin them, with a view to explaining why they did not reduce their price throughout the country *as per contract*." On July 12 the Bureau replied that the letter was returned because it left room "for misinterpretation of this service." The criticism was that it spoke of a "change in *the* price," suggesting that the writer intended to say a "change in *our* price," and also that it spoke of the Archer-Daniels Company having failed to reduce its price "as per contract," stating that while the action of the Archer-Daniels Company was unbusinesslike, yet there was no agreement in the contract requiring that such be done. (R. 608–9.) As a matter of fact a positive understanding and agreement had been made between the members of the Bureau dividing the country into zones and requiring that the price in each zone be composed of the price in zone 1 plus the differential.

In a letter written by Quine to the Bureau on July 15, 1919 mention was made of "*the* cooperage price" and "*the* price in wooden barrels." This letter was returned, accompanied with a criticism of these expressions, and a suggestion that if the letter were revised accordingly it would be published (R. 609–10).

On July 16, 1919, the Midland Company wrote the Bureau that it had been advised by an agent that he had been quoted by a competitor an allowance of four cents per gallon less on oil in steel drums than in

wooden barrels and that "it is our understanding that *the regular differential is three cents per gallon*" and asking that it be ascertained if a competitor had made such offer. This letter was returned, attention being called to the expression about the differential of three cents; and it was stated that under the Bureau's operation there could be no understanding as to differentials any more than as to prices. It was suggested that the letter be rewritten, the language that should be used being quoted (R. 610–11). As a matter of fact, as heretofore shown, differentials had been positively agreed upon before that date.

In a letter written by the Ankeney Company on September 19, 1919, it was mentioned that the company's Indianapolis agent had made a delivery at the September price, and that "In fact we have not yet advised him, as we reported in our recent letter, that there would be any lower prices for September. He got all this information from the trade"; and it was said that he had been instructed to thereafter adhere strictly to their prices. This letter was returned with a criticism of the expression "at the September price," and it was suggested that it be revised and again sent in (R. 611–612). It is apparent from the statement in the letter of the Ankeney Company that there was a prior understanding of a reduction of prices for September.

In a letter of the manager of the American Company to the Bureau dated September 22, 1919, it was said that some of the subscribers were quoting oil for August delivery "at *the* September price." This

letter was returned because of legal exceptions to the language used (R. 612). In a letter from the same company of September 29, 1919, mention was made of "*the* October price," and this letter was returned with the suggestion that the expression "*your* October price" be used (R. 612–13).

In a letter from the Ankeney Company dated October 3, 1919 was the statement, "We very often put in a change in our price *without having quoted the trade*, but this change in our price is relayed the same as a quotation." This letter was returned with the statement that the subscriber had overlooked the fact that the Bureau clears only information on past transactions "and therefore it would be unlawful for you to advise the Bureau of any changes in your prices which you have not actually quoted to your trade. It is not permissible for you to change your price list and so advise the Bureau unless that constitutes a bona fide change in your prices, and that means those prices must be actually quoted." And the subscriber was asked that it advise the Bureau "that you now thoroughly understand this point" (R. 613–14). That such a distinction could be considered as material shows the absurdity of the Bureau's contention.

In a report of sales made by Archer-Daniels Company on November 4, 1919, it was said, "The above sale was made on a quotation sent out before *the advance*." In a report of November 26, 1919 by the same company there was a note "*sold previous to advance*". Both of these reports were returned for legal

exceptions, the criticism manifestly being that in speaking of the advance the language should have been "*our* advance" so as not to imply that the advance was one agreed upon.

In a letter written by the Sherwin-Williams Company on November 18, 1919, the writer used the expressions "*the* market price of linseed oil," "*the* carload market," and "*the* carload price" and made the statement that "in view of the fact that *the published price of oil f. o. b. warehouse is three cents more than cars cooperage*," the writer could not understand the methods of subscriber No. 3's representative and would like his action explained (R. 616). This letter was "returned for legal exception to the clauses marked." The letter was rewritten and sent to the Bureau with the expression "the filed price" substituted for "the market price," and "the filed price with the Bureau" for "the carload market," and instead of "the published price of oil," etc., there was substituted "Subscriber No. 3's filed price of oil." The letter was again returned, and it was pointed out that "Your letter of November 20 refers in three different places to 'the file price.' If you have in mind the file price of a particular subscriber it should be so stated;" and it was requested that the letter be again written and sent in. On the 26th of November the Sherwin-Williams Company replied: "I want to thank you for drawing my attention to the various matters for correction in my letter of November 20, which you returned, and, of course, now understand fully with regard to the legal exceptions you have

taken to this letter;" and the letter as rewritten was again sent in. But the subscriber's understanding of the fine points of the correspondence was not so thorough as he had thought; and he unfortunately substituted for the phrase "over the filed price" the phrase "over the market price," and for the third time the letter was returned, the Bureau pointing out that the expression should have been "our market price." It is presumed that the fourth trial was a charm, as there is no record of the substituted letter being again returned (R. 616–619).

On November 24, 1919, the Toledo Seed Oil Company wrote the Bureau: "in response to market letter No. 959, we certainly agree with you on the point raised by Spencer-Kellogg Sons, that furnishing representatives of the crushers with advance information that the price is going to advance in order that they might go out and take business before the advance, could hardly be classed under the title of 'fair play,' and that we only trust the time is not far distant when this practice will be absolutely discontinued, if it is in the practice at the present time." This letter was returned "for legal exception to the clauses marked." On December 1 the Toledo Company's attention was called to the fact that the letter had been returned; and it was urged that corrections be made and the letter sent back so that it might be cleared to other subscribers promptly. The letter as revised does not appear in the record. It was either drawn with phraseology sufficiently nice to meet the requirements of the Bureau, or the

writer thought it a hopeless task to endeavor to make the necessary corrections (R. 619–620).

In a letter written by the Midland Company on December 2, 1919, it was said: "We enclose herewith copy of a letter just received from our Boston agent, from which you will note that he has neither sold any oil below *the authorized price* nor handled any foreign oil"; and a copy of the letter written by the representative of the Midland Company was enclosed. This letter was returned "for legal exception to the clauses marked" (R. 620–621).

SPOT QUOTATIONS.

Exhibits 3 and 3b are tables showing the spot quotations telegraphed to the Bureau by the several members. The two tables contain the same information, but in Exhibit 3 the days upon which no changes in quotations were made are omitted, while the quotations prevalent for all the days appear in Exhibit 3b. These tables cover the entire period from October 1, 1918, the date upon which defendants began to operate under the plan, to June 30, 1920, the date upon which the bill in this case was filed. There were fourteen manufacturers who contracted with the Bureau and operated under the plan. But it appears that Mann Bros. Company was not connected with them in the beginning; and at times one or two were not reporting. Each of them is indicated in the table by a number which appears at the top of its column. For instance, the American Linseed Company is No. 1 and Mann Bros. Company is No. 14 (R. 183). We here call

attention to the fact that the subscriber which was oftenest out of line was No. 11, Sherwin-Williams Co., whose prices had no effect on the market, as its sales were made very largely, if not entirely, to its own factories. On October 1, 1918, nine members quoted spot sales at $1.79, one member at $1.81, one member at $1.85, and one at $1.89. There were several changes of a few cents each during that month. We will begin the analysis on November 9, 1918, which, according to Mr. Armstrong, was before the plan became effective (R. 135). On that date nine members were quoting at $1.58, two at $1.61 and one at $1.49. There were no changes in these quotations until November 25, when one member reduced from $1.58 to $1.53. *On the following day nine members reduced to $1.53* (R. 184–5). During this time but twelve members were reporting. On the 27th one member reduced from $1.61 to $1.56, and on the 29th this member further reduced to $1.53, on which date eleven members were quoting at $1.53 and one, Sherwin-Williams Co., at $1.49. *These quotations were continued without any change throughout the month of December and until January 14, 1919,* when two members reduced their quotations from $1.53 to $1.48 (R. 185). *On the following day, January 15, these same two members reduced from $1.48 to $1.43, and eight members reduced from $1.53 to $1.43, six of them quoting a reduction to $1.48 during a part of the day, but closing their quotations at $1.43.* On January 16 another member reduced from

$1.48 to $1.43. *Thus in three days all the eleven members that were previously quoting at $1.53 had reduced to $1.43,* still leaving one, No. 11, the Sherwin-Williams Company, quoting at $1.49. *These identical quotations continued through the remainder of January and until February 17, when the Sherwin-Williams Company reduced to $1.43* (R. 185), *thus making the quotations uniform. This uniformity continued until March 5, when five members increased their quotations from $1.43 to $1.48; and on the following day the remaining seven members then quoting increased their quotations to $1.48 (R. 185), thus in two days establishing a uniform advance of five cents; which uniformity continued through the remainder of the month of March and until April 9.* On that date six members increased from $1.48 to $1.51, *and on the following day the remaining six moved up to the same point, thus again within two days establishing uniformity at a 3¢ higher level.* This uniformity continued until April 23 (R. 186). Then prices increased until on April 28 *all were quoting at $1.56.* Most of the members continued to quote for a few days at $1.56, then reduced to $1.54, which price all but one were quoting on May 7. By the 26th eight had returned to $1.56. Then the upward movement began that culminated at the peak of $2.20, *the price that all uniformly quoted from August 1 to August 28.* In this movement often nearly uniform prices would be reached, which would be immediately broken by another advance, thus from June 6 to 10 ten members quoted at $1.71 and three at $1.70.

On June 26 and 27 all quoted at $1.86. On July 2 twelve quoted at $1.93 and one at $2.00. On July 9 all quoted at $2.10. From July 15 to 24 all were quoting at $2.15. Then they on different dates advanced to $2.20, one halting for three days at $2.18 (R. 185–6). On August 28 one member dropped to $2.10. *On September 1 every other member dropped 10¢ to $2.10,* with the exception of two, and one of them dropped to $2.09. On the 2nd all quoted $2.10 except the one quoting at $2.09; and these quotations were continued until October 1. *The court's special attention is called to what occurred upon that date. Every member dropped 26¢ except the one quoting at $2.09, who dropped 25¢. And every quotation on that date and until October 6 was $1.84* (R. 187), a most remarkable economic phenomenon if there was no understanding between the producers. There were reductions until on the 17th all were quoting at $1.70. These uniform quotations continued through the remainder of October and until November 22, when a rally set in, which by the 28th of November had brought them all back to $1.75 (R. 187). This continued until December 2, and was followed by further advances until on December 11 all were quoting at $1.85. Quotations remained stationary at that point until January 1, 1920. Then a phenomenon like that of October 1 occurred. *Every member dropped 10¢, to $1.75, and there the quotations stood through January and February and until the 4th of March* (R. 188). At that time the Bureau was under investigation; and

because of that fact or for some other reason quotations were much more varied than at any other time except probably when prices were moving up towards the peak of August. Thus on the day the original bill in this case were filed one was quoting at $1.58, one at $1.60, one at $1.62, one at $1.66, one at $1.68, and five at $1.69 (R. 189).

The daily spread between the prices of the members which appears in the last column of these tables is not specially significant. If one were quoting at $1.70 and twelve at $1.85 the spread would be the same as if but one were quoting at $1.70, one at $1.85 and all the others at different figures between these extremes.

QUOTATIONS FOR FUTURE DELIVERY.

Plaintiff's Exhibit No. 4 (R. 210–252) is a table showing the quotations of the subscribers to the Bureau for future delivery. We will endeavor to make only such an analysis of this table as will show the relation of the quotations of the several members to each other. Quotations in any one month for delivery in future months were usually the same, or very nearly so upon the same dates, except during the immediately preceding month. For illustration, quotations on the same days in May, 1919, for July deliveries, were about the same as those for August, but quotations for June, especially those made the latter part of May, were different from quotations for July and August. We will therefore call attention only to the quotations during the immediately preceding month and the latter part of the month previous thereto, as to go further back would be but a repetition.

Quotations for November delivery, 1918:

As the association began to function on the 1st day of October, no quotations are given previous to that date. All quotations submitted for the first seven days of October were $1.71. On the 8th six of the nine members reporting changed to $1.66, two remained at $1.71 and one changed to $1.76. There were changes on thirteen of the remaining days of the month, and the quotations were not uniform on any day; but on the 26th nine of the twelve members reporting were quoting at $1.55, one at $1.56, one at $1.63, and one at $1.76. By the 30th the nine that were quoting on the 26th at $1.55 had changed to $1.51, while the other three retained their former quotations (R. 210).

Quotations for December delivery, 1918:

On November 1 eight out of twelve members were quoting at $1.51, one at $1.49, one at $1.53, one at $1.56, and one at $1.73. By the 8th eight of the members had changed to $1.58, one was still quoting at $1.49, two at $1.53, and one at $1.73. These quotations contined until the 25th, when another member changed from $1.53 to $1.58; and on the 26th ten out of twelve were quoting at $1.53, leaving one still quoting at $1.49 and one at $1.73. This continued to the end of the month (R. 211).

Quotations for January delivery, 1919:

On November 26 all quotations for this month were at $1.53, *and they remained uniform at these figures throughout the entire month of December* (R. 212).

By this time the system had begun to properly unction.

Quotations for February delivery, 1919:

Quotations for this month were uniform at $1.53 from November 26, throughout December, and until January 14. On that day two members changed to $1.48. On the 15th ten members dropped to $1.43, five reducing first to $1.48 and at a later hour to $1.43. *On the following day, January 16, all were quoting at $1.43, and the quotations continued uniform to the end of the month* (R. 213).

Quotations for March delivery, 1919:

On January 14, 15, and 16 the members were making the same quotations for March as for February. Therefore, on the 16th of January they had all reduced to $1.43, *and this uniform quotation continued throughout the remainder of January and during the entire month of February* (R. 214).

Quotations for April delivery, 1919:

The same uniform quotations for this month prevailed after January 14 and throughout the month of February as were made for March delivery, and the uniformity at $1.43 was continued until March 5. On that day six members advanced to $1.48, *and on the following day, March 6, the remaining five members then reporting advanced to $1.48, and these uniform quotations were continued during the remainder of the month* (R. 215).

Quotations for May delivery, 1919:

From March 6 to April 10 ten of the eleven members reporting quoted at $1.48 and one at $1.43, who on that day advanced to $1.48. This continued to the 23rd, when one advanced to $1.56. On the next

day three made a like advance; one advanced to $1.51 and one to $1.53; and on the 25th ten were quoting at $1.56 and two at $1.48, another member having begun quoting on April 10. On the following day one of the two advanced to $1.56, and on the 28th all were quoting at $1.56. On the 30th eleven were quoting at $1.56 and one at $1.54 (R. 216).

Quotations for June delivery, 1919:

On April 28 the quotations of all twelve reporting members for this month were $1.53. On the 30th one member reduced to $1.51. There was a gradual reduction to that figure until, on the 8th, ten were quoting at $1.51, one at $1.52 and one remaining at $1.53; and these quotations continued until the 14th, when there began a general shifting upwards, the movement having begun for the high peak which was reached a month or two later. On the 16th one advanced from $1.51 to $1.56, and the movement upward continued until on the 29th ten were quoting at $1.59, one at $1.61 and one at $1.62 (R. 217).

Quotations for July delivery, 1919:

On May 28 eleven of the twelve members reporting were quoting at $1.56 and one at $1.53. From then on to the last of June there was a general and almost continuous advance. For illustration, on June 6 two were quoting at $1.70, nine at $1.71 and one at $1.75. On the 10th eleven were quoting at $1.71 (one additional member reporting); one at $1.70 and one at $1.75. There were then advances to $1.78, $1.81, $1.83, $1.86, and finally to $1.93. On the 20th one was quoting at $1.81, four at $1.83, one at

$1.85, and seven at $1.86; and on June 30 ten were quoting at $1.93 and three at $1.86 (R. 218–219).

Quotations for August delivery, 1919:

On June 30 quotations for this month were, ten at $1.93, three at $1.86. On July 1 all but one of the thirteen reporting quoted $1.93 and its quotation was $1.86. The general advance continued, the quotations increasing to $2.00, $2.03, $2.10, $2.15, $2.16, and $2.20, one member advancing for one day to $2.25, another for two days to $2.25, and another for three days to $2.25. For illustration, on the 8th ten were quoting at $2.10, one at $1.93, one at $2.00, and one at $2.03. On the following day all but one were quoting at $2.10 and it at $2.00. The following day, the 10th, that member advanced to $2.10, but another advanced to $2.15 and still another to $2.20. On the 15th all were quoting at $2.15. On the 26th eight had advanced to $2.20; four were quoting at $2.15 and one at $2.18, and on the 31st all were quoting at $2.20 (R. 220–221).

Quotations for September delivery, 1919:

On July 31 twelve members were quoting for September at $2.20 and one at $2.17. These quotations continued until August 4th, when all were quoting at $2.20. This continued from the 4th to the 22nd, when one reduced to $2.16. On the 26th this member reduced to $2.10, and another member reduced from $2.20 to $2.10. On the 27th seven of the thirteen members were quoting at $2.10 and the remaining six at $2.20. On the 28th all but one had reduced to $2.10, and on the 29th eleven were

quoting at $2.10, one at $2.20 and one at $2.09 (R. 222–223).

Quotations for October delivery, 1919:

On August 30 twelve members were quoting at $2.00 and one at $1.99. These quotations continued till September 13, when three members reduced to $1.89. There were further reductions to $1.88 and $1.84, until on September 30 all the members were quoting uniformly at $1.84 (R. 226).

Quotations for November delivery, 1919:

There seemed to be a prevalent idea that the price of oil would fall, and hence quotations for November were lower than the quotations for October. On October 1 nine members were quoting at $1.63, one at $1.66, one at $1.70, and two at $1.72. On the 2nd eleven members were quoting at $1.63 and two at $1.72. On the 3rd twelve were quoting at $1.63, and one at $1.60. From the 4th there was a rally until on the 8th eleven were quoting at $1.70 and two at $1.60, and on the 9th another member advanced to $1.70; and these quotations continued until the 15th, when all were quoting at $1.70; and these uniform quotations continued to the end of the month (R. 229).

Quotations for December delivery, 1919:

On October 15 all but one were quoting at $1.70 and that one at $1.59. These quotations continued until November 10, when all were quoting at $1.70. Twelve days later, on the 22nd, one advanced to $1.75, and on the 24th ten were quoting at $1.75 and three at $1.70. On the following day one of

those advanced to $1.75, and on the 26th still another advanced to $1.75; and on the 28th all were quoting at $1.75. On the 29th one member advanced to $1.85 (R. 233).

Quotations for January delivery, 1920:

On November 28 all members were quoting for this month at $1.75. On the 29th one increased to $1.85. On December 2 two others increased to $1.85, and on the 3rd four of the thirteen were quoting at $1.85; on the 4th seven were quoting at $1.85 and six at $1.75. Between the 4th and the 22nd there was a shifting back to $1.75, until on the 16th ten were quoting at $1.75 and three at $1.85. On the 17th another reduced to $1.75, and on the 18th all were quoting at $1.75, which quotations were continued until the end of the month (R. 236).

Quotations for February delivery, 1920:

On December 22 quotations for this month were uniform at $1.75, *and this uniformity was continued throughout the month of January* (R. 240).

Quotations for March delivery, 1920:

As for the months of January and February so for the month of March, the quotations became uniform at $1.75 on December 22, and that uniformity continued through the remainder of that month and throughout both January and February (R. 243).

Quotations for April delivery, 1920:

Quotations for this month were on January 15 uniform at $1.70, and this uniformity continued

through the remainder of that month and the entire month of February and until March 4, when three members advanced to $1.72 and one did not quote. There was a gradual advance, and on March 11 nine members were quoting at $1.82, one at $1.72 and two at $1.77 (one not reporting); and on March 12 all reporting were quoting at $1.82. This uniformity continued until the 18th, when one advanced to $1.87, and these quotations continued until the 25th, when all but one of the eleven members then reporting quoted at $1.82, and that one at $1.77. There were other changes between the 25th and the 31st, when nine were quoting at $1.82 and two at $1.72 (R. 245–246).

Quotations for May delivery, 1920:

On March 31 nine members were quoting for this month at $1.82 and two at $1.72. On April 2 another member advanced to $1.82, and these quotations continued until the 6th, when all members were quoting at $1.82. This uniformity continued until the 16th, when one member reduced to $1.77 and two to $1.79. On the following day another member reduced to $1.79. Other reductions followed until on the 28th one was quoting at $1.70, five at $1.72, one at $1.74, one at $1.79, and one at $1.82 (R. 249).

Quotations for June delivery, 1920:

The tendency downward which had begun about March 11 was continued, and on May 1 nine members were quoting at $1.72, one at $1.70, and one at $1.79. Still further reductions followed until the 29th, the date of the last quotation, when

eight were quoting at $1.72, one at $1.60, one at $1.62, and one at $1.65 (R. 250–252).

This table shows greater variations and a more rapid movement on a rising than on a falling market, as a member is not subject to criticism for advancing his price, and he is anxious to keep up with or surpass the leader. This tendency was especially marked in the *Hardwood Lumber* case, which will be hereafter fully discussed. The more numerous variations in quotations after February are significant, because the members then knew the Bureau was under investigation.

PRODUCTION, IMPORTATIONS, AND EXPORTATIONS OF LINSEED OIL.

Plaintiff's Exhibit No. 9 (R. 258–268) shows the production, consumption, importations and exportations of animal and vegetable fats, and oils produced therefrom, by periods of three months each during the years 1919 and 1920. An examination of these statistics and a comparison of the quantities of linseed oil produced, exported and imported, with the prices of oils then prevailing, give the following results. (The figures relating to quantity denote pounds and those relating to prices denote dollars and cents.)

During the quarter ending March 31, 1919 the production of linseed oil was 88,704,568 (R. 258). The excess of exports over imports was 2,451,258 (R. 267, 268). The stock on hand at the beginning of the quarter is not shown. The total quantity for consumption in this country therefore was 86,253,310.

The consumption reported was 35,445,224 (R. 258). During this period, notwithstanding the quantity on hand apparently greatly exceeded the actual consumption, spot prices just about held their own. Starting in at the uniform price of $1.53, by the middle of January nearly all the members had reduced to $1.43, and by the middle of February that price had become uniform; but by March 6 it had recovered to a uniform price of $1.48, and so continued during the remainder of the quarter (R. 185).

For the second quarter, April 1 to June 30, 1919, the production was 95,040,905; excess of imports over exports, and re-exports, 3,768,900 (R. 267–8); stock on hand at the beginning of the quarter, 7,117,410 (R. 264); making an available total in this country of 172,927,215. The consumption actually reported was 50,529,147 (R. 259). This period of abundance in supply began by all quoting at $1.48, and on April 9 six advanced to $1.51. The prices moved upward until on the 28th they became uniform at $1.56. On April 30 one reduced to $1.54. Others reduced until by the middle of May all but two were selling at that price, but by the last of May ten were selling at $1.59, one at $1.61 and one at $1.62, and prices continued to advance until on the last day of the quarter nine were selling at $1.86 and four at $1.93 (R 185–186).

For the third quarter, July 1 to September 30, 1919, production was 129,221,965 (R. 258). Stock on hand was 54,095,151 (R. 264), and excess of exports and re-

exports over imports 1,129,589 (R. 267–8), leaving a total quantity to draw from of 182,187,527. The consumption reported was 52,032,833 (R. 259). During this period of increasing abundance the prices reached their peak. They began with all quoting at $1.93 but one, who was quoting at $1.86. Prices immediately advanced, and by the 9th all but one were quoting at $2.10 and he at $2.00. On August 1 all had advanced to $2.20, which uniform price continued until the 28th, when one reduced to $2.10, and on September 1 all had reduced to $2.10 but one, and he quoted at $2.09. These prices continued until the end of the quarter (R. 186–7).

For the fourth quarter, October 1 to December 31, 1919, the production was 139,960,360 (R. 258). Stock on hand, 52,082,945 (R. 264) and excess of imports over exports, 4,635,235 (R. 267–8). Total for consumption was therefore 196,678,540. The consumption reported was 51,138,445 (R. 259), or 894,388 less than for the previous quarter. The prices during this quarter averaged considerably less than during the previous quarter. *They started at a uniform price of $1.84, a drop on that day of 26 cents by every manufacturer except one* and by him of 25 cents. By the 17th the prices had continued to drop until they were uniform at $1.70, *which uniform price prevailed until November 22.* But notwithstanding the enormous quantities produced and on hand, the prices began to rally, and on the 28th of November they were uniform at $1.75, and by December 11 they had advanced another ten cents, and were uniform at

$1.85, which price continued to the end of the quarter (R. 187–8).

For the first quarter of 1920, January 1 to March 31, the production was 117,225,669 (R. 258); stock on hand 81,406,296 (R. 259), and excess of imports over exports and re-exports 18,086,925 (R. 267–8). The total supply therefore was 216,718,890. The consumption reported was 58,219,239 (R. 259). Therefore the stock to draw from was 22,854,700 less than for the previous quarter, and the reported consumption was 7,080,794 greater than for that quarter, yet the average prices were about the same. On the last day of the previous quarter all were quoting at $1.85. *On the first day of this quarter everyone dropped to $1.75. This uniform price was continued to March 4,* when a rally started which by the 12th had increased the prices to the uniform level of $1.82. On the 18th one member attempted to push the price to $1.87, but on the 25th he returned to $1.82. Then a few members dropped to $1.72, but at the close of the quarter all who reported were quoting at $1.82 except one, and he at $1.72 (R. 188).

For the second quarter of 1920, April 1 to June 30, production was 121,406,571 (R. 258); stock on hand 67,842,497 (R. 264); excess of imports over exports 3,970,260. Total supply was 193,219,328, or 23,499,562 less than for the previous quarter. The consumption reported was 943,556 (R. 259), or but 275,683 less than for the previous quarter. During this entire quarter the subscribers knew that the Bureau was under investigation. The prices this

quarter were gradually reduced, starting on April 1 with nine quoting at $1.82 and two at $1.72, one of whom went to $1.82 on the 2nd and the other on the 6th, making prices uniform at that figure. *There were gradual reductions to $1.79, $1.72, $1.69, and $1.68, until when the quarter closed, the day on which the bill was filed, one was quoting at $1.58, one at $1.60, two at $1.62, one at $1.68, and five at $1.69* (R. 188-189).

These statistics indicate that the price of linseed oil was not determined by the law of supply and demand. While the quantities on hand and the demand undoubtedly had an influence upon the prices, yet they were manifestly largely controlled by forces other than that law.

It is fair to state, however, that this table manifestly does not show the actual consumption of oil. In the preface to the report of the Department of Commerce, of which this table is a part, it is shown that as to some fats and oils the entire amounts consumed do not appear because reports from many sources could not be obtained.

ORAL TESTIMONY INTRODUCED BY THE GOVERNMENT.

The Government relied very largely upon the facts proven by the exhibits filed by it, but it introduced a few witnesses who testified in substance that the prices of oil quoted by the several members of the Bureau after its organization were uniform, or were much more nearly uniform than they were previous to its organization (William Hoch, manager paint and wall

paper department of Sears, Roebuck & Co., R. 52; F. J. Hurtz, purchasing agent for Bradley & Vrooman, R. 55; Solomon L. Sulzberger, president Enterprise Paint Mfg. Co., R. 58; M. A. Richardson, president Inland White Lead Company, R. 63). Mr. Richardson also testified that in 1919 he had a conversation with Mr. William O. Goodrich of the Goodrich Company; and that he mentioned the Armstrong Bureau to Mr Goodrich and told him that he thought they were "soaking us on prices;" and Goodrich said that it was a very strong organization, and that "we all ought to be satisfied, because we all buy at the same price and that we could add it on to the price of the paint" (R. 63–4). Mr. Goodrich denies that he made this particular statement to Mr. Richardson, but says that if he did discuss the Bureau with him it was in a general way (R. 95).

ORAL EVIDENCE INTRODUCED BY DEFENDANTS.

The defendants introduced a number of witnesses, several of them being representatives of the producers. All of them denied that they had entered into any agreement with reference to prices, and said they did not feel themselves bound in any respect to maintain any specific price. The witnesses also endeavored to justify the scheme operated by the defendants, and to show that the results were beneficial, not only to the industry, but to the purchasers as well.

Reasons why the crushers joined the Bureau.

The representatives of some of the defendants who testified undertook to explain why they joined the Bureau. Mr. Mairs of the Archer-Daniels Company said: "We joined the Armstrong Bureau in order to get market quotations which we felt would be reliable, and to get any other advantages which the Armstrong Bureau could bring through the intelligent marketing of linseed oil." However, he could think of no specific advantage other than market quotations (R. 75). Mr. Goodrich stated that he did not know that there were any conditions in the industry that led him to join the Bureau, continuing, "I regarded the plan proposed by it as a very good one, which would change conditions then existing for the better. I refer to the general feeling of distrust and lack of confidence in the various members engaged in the industry and to the general darkness that surrounded me in my attempts to gauge conditions" (R. 93). Upon the same subject he further says, in response to a question by the court, "I think, your Honor, that the conditions were rather aggravated in the linseed oil industry. It so happened that there were two or three very large crushers, and my position was made more difficult by that fact. There was not the greatest amount of harmony existing between the large crushers and the small crushers, and I welcomed this opportunity, after some study, as being one to relieve that situation and to bring a little bit of the 'golden rule' into the actions of the crushers" (R. 98–99).

Mr. Martin of the Sherwin-Williams Company claims that that concern joined because the linseed oil industry was the most unsatisfactory that they had to contend with; and they believed from the information given by those who tried to introduce the service they could eliminate some of the irregularities or abuses, which were beyond the control of any one individual. First among the irregularities were the wide fluctuations and the speculations in flax—things of that sort—and another was freight conditions (R. 104). *But the Bureau certainly made no effort to control fluctuations in flax, nor did it modify freight rates except by adopting the zoning system, which did not affect in the least the actual rates.*

Mr. Nolan of the National Lead Company states their reason for joining a little more frankly. He says:

> We joined the bureau because we believed then, as I would believe now, in cooperation of any kind among industries, in any kind of organization that will tend toward simplifying business dealing in general. *I think the same terms all the way through are advantageous to the buyer as well as to the seller.* In other words, I believe if one man is charging so much a gallon more for oil in a barrel or half barrel it would simplify it some for the sellers if they would all charge so much a gallon increase for half a barrel over a barrel price, instead of four or five of them having different ideas about it. For instance, the price of oil might be 60 cents a gallon; that is, in barrels; if you want a half barrel of oil I would charge you 60 cents

> a gallon or 5 cents over for the half barrel, whereas somebody else would charge 60 cents a gallon plus $1.50 additional. The purchaser would pay the same price, but it would be better for each of us to go along on the same basis, instead of one charging so much a gallon extra and another so much for the half barrel. *I think it is an advantage all the way through to have a market uniformity* (R. 112).

He claims, however, that such cooperation had nothing to do with prices. But how the system can work so nicely as to terms of sale and other practices incident to the trade, and have nothing whatever to do with prices neither this witness nor any other undertakes to explain.

Mr. Quine of the American Company says that they joined "to obtain the advantage of statistical information with respect to the industry and exchange of ideas with respect to operation, and possibly other matters that go to make up our business," but he also claims that they had no hope of being able to get together with the other crushers upon the matter of prices (R. 115).

The anxiety of the members to get information of what others were doing and their pretended claim that such information could have no effect is illustrated by the following statements of Mr. Quine:

> Now, if a competitor had filed a price for September, October, November, December, and it stood there, and my men in Indianapolis wrote me that a competitor was including August in a price which he had filed in Sep-

tember, I would want to know whether he was selling for August and September, instead of September-December at that price. *I would just want to be posted on what was going on, for information, and I do not think it would have any bearing on my price. I would just want to know what the competitor's attitude was with respect to the market. We always get that information and we like to have it* (R. 119).

One wonders at such anxiety if the information was of no use.

Stabilization of the market and "constructive" competition.

The excuse given by the witnesses, and especially by the experts, for the existence of the Bureau is that it merely "stabilizes" prices and preserves "constructive" competition, admitting that it does eliminate what they are pleased to call sometimes "blind" competition, and at other times "cut-throat" competition; and the witnesses discuss at length what is meant by "stabilization" of the market and by "constructive" competition.

Mr. Mairs says that he understands that "a stabilized market is a market where the demand for linseed oil did not exceed the supply of flaxseed" (R. 78); and he thinks that if everyone has all the information regarding the industry, the consumption of oil, prices of flaxseed, the conditions of the flax crop, such check would tend to stabilize the market (R. 78). But this Bureau had nothing to do with the production of flaxseed; nor did it exchange information in regard to the price of flaxseed or the

conditions of the flax crop unless those matters were discussed at their meetings; and the minutes of the meetings are silent upon that subject, or if mentioned at all, it is only in an incidental way.

Mr. Ferry, the assistant director of the Bureau, defines a "stabilized" market as "a market where the competitive prices are regulated only by the law of supply and demand. Further, it is a market which is not affected by the more violent fluctuations that naturally result from a lack of accurate market information" (R. 85). Again, upon the same subject, he says: "'Stabilization' of market means a market where competitive prices—that is the prices of all the factors in that market—are based on this supply and demand; in other words, where the law of supply and demand is allowed to operate. But where factors in that market are possessed of accurate, definite market information, it will prevent them from—it will prevent wild fluctuations that so often are aroused by suspicion and, I think, largely by fear." He admits, however, that fluctuations do not always arise from suspicion, and he thinks incidentally that the elimination of fluctuations is a part of what is meant by "stabilization" (R. 88).

Mr. Armstrong, the proprietor of the Bureau, thus defines a "stabilized" market: "I call a 'stabilized market' a market in which competitive prices operate upon the law of supply and demand *plus the knowledge of individual costs in the market and unaffected by the wide fluctuations that are obtained from misinformation.*" This adds one element to the definition by

Mr. Ferry, who limits it to the operation of the law of supply and demand alone. And the element *of a perfect knowledge of the business of every competitor,* which Mr. Armstrong defines as "the knowledge of individual costs in the market," is the one that is added by the operation of this Bureau; and it certainly vitally modifies the conditions naturally existing between competitors before the adoption of the system.

Mr. Armstrong undertakes to make an explanation of the two kinds of competition, one the "blind" competition and the other "constructive" competition; and in his illustration he takes eight sales made by a manufacturer. He says that under the "constructive" system the manufacturer will make a profit of $12.50 on each sale, or a total of $100, whereas under the "blind" system he will make the $100, but less of it from some customers than from others; and that under such circumstances "the public has to pay the bill." Of course the public in one instance pays no more than in the other, as it is only a few individuals who are unfortunate. But the illustration is purely imaginary, as the profit of $100 on the eight sales would in all probability be grossly excessive, and would not be realized under "blind" competition.

He further says that "it has been shown in the linseed oil industry that the cost to work a bushel of flaxseed varies from 55¢ to 85¢ on figures given to me simultaneously. (As one bushel of flaxseed produces 2½ gallons of oil (R. 71), the variations are

from 22¢ to 34¢ per gallon.) Now, with the margin of profit varying we would have in the market, so far as the public is concerned, a range of prices. In other words, we would all be on the same basis if we dealt with the same seller, but a market would be pictured as in my explanation wherein anyone could seek out the lowest seller and could get such saving as might be afforded and wherein there would be a range of prices just as there is in this linseed oil industry"; and then the following colloquy was had between the court and the witness:

> CARPENTER, J. I wondered if you were going to reach the point where you would tell us why the man who had the smallest cost of production shouldn't undersell his neighbor who had to pay more.
>
> A. The manufacturers who have reached that stage are generally the larger companies. They have spent years in bringing their business to that point of efficiency. In spending this time they have spent a great deal of money. *Now I have contended, and this is where I venture into the field of idealism, which I hesitate to do in this trial, but it is, in my judgment, only right that a manufacturer who has expended time and effort and money to bring his factory to the point of efficiency, should not throw it away by underselling his competitors so that they would go out of business, so to speak. Do I make that point clear? It is difficult to explain.*
>
> CARPENTER, J. Well, then, the idealism is on his part.
>
> A. No; it is cold dollars and cents.

CARPENTER, J. No; but if he has failed to undersell his competitors and put them all out of business, the fact that he does not do it sort of borders on idealism?

A. Well, now if he pursues the course that I have suggested here, and while he may not sell his product at the peak—in other words, at the cost of the smaller manufacturers—and he doesn't, he nevertheless, by taking that profit that he would otherwise lose if he sold it closer to cost than necessary, delivers a better return to his stockholders and gets back some of his money that he has spent in getting his plant to his point of efficiency (R. 139).

Mr. Ferry defines "constructive" competition as used in the book which he wrote for the use of the Bureau and as used in their correspondence, as "competition which is based on knowledge of manufacturing costs for one item, which is based on the law of supply and demand, and which is based on other accurate information and, I might add, which is based on the idea of fairness to competitors as well as to those who buy of the industry" (R. 84). And he defines "destructive" competition as meaning "competition where goods are sold absolutely on the basis of price alone, and where the quality does not make any particular difference. It is a case of 'get the business regardless.' If in this state of destructive competition the manufacturer has cut his price down far enough, *he is going to cut the quality of his goods*" (R. 90). The absurdity of applying this definition of natural or so-called "destructive" competition to the linseed oil industry is shown by the fact that, as

stated by Mr. Mann, "*there is no variation in quality of linseed oil*, but there is a variation in the quality of seed. *The buyer of linseed oil gets substantially the same article from everybody*" (R. 71).

Effect of exchange of information.

Mr. Hirst, of Hirst & Begley, frankly states what effect in his judgment the exchange of information has upon prices. His testimony on cross-examination upon this subject is as follows:

> Q. Now the fact of that interchange of prices through the bureau among the crushers, didn't that have a tendency to stabilize the market?
>
> A. Yes.
>
> Q. It did?
>
> A. I think so.
>
> Q. And did it not have a tendency to make the prices somewhat more uniform than otherwise?
>
> A. I think so.
>
> * * * * *
>
> Q. Wasn't that exchange of prices, of price lists, through the bureau—*did that have a tendency to assist at uniformity of prices?*
>
> A. *I don't think there is any question about that.*
>
> Q. *No question about that?*
>
> A. *I don't think so* (R. 147–8).

Mr. Goodrich claims that in determining his price he found out the cost of production and then what the general market was; and then decided whether he could meet or cut under a competitor's price. He undertakes to point out a specific instance where in

the winter of 1919 he sold to Farr-Bailey Company of Philadelphia, who are large manufacturers of linoleum, oil at $1.59, dropping nine cents, his filed price then being $1.68 (R. 94). There is some doubt about the correctness of Mr. Goodrich's memory respecting this transaction. The Goodrich Company is No. 4 in the tables filed as Government's Exhibit 3 and 3b, and an inspection of those tables will show that that company did not during either the winter of 1918–1919 or 1919–1920 make a drop in its prices from $1.68 to $1.59. In fact it quoted the price of $1.59 but twice from the organization of the Bureau on October 1, 1918, until January 1, 1920. The first time was from October 12 to 16, 1919, when it dropped from $1.64, and when eight of its competitors were quoting at $1.59. On the 17th it further reduced to $1.53, on the 18th to $1.51, and on the 19th to $1.48, all of its competitors reducing about the same time. The second time was from May 27 to 29, 1919, when it advanced from $1.56 to $1.59, and only two competitors were when the increase was made quoting as high as $1.59 (R. 184–6).

Further along Mr. Goodrich said that "their [his competitors] prices are only a guide to me as to the general condition of the trade" (R. 97). But on cross-examination he testified:

> Q. And you attached no importance to the fact that you had received this notice of price, which was on file by the large crushers with the bureau, and that they were bound to give immediate notice through the bureau to you of any change?

A. *Why, certainly I attached some importance to it. It is one of those things which gave me a guide as to the general trend of the market.*

Q. *In making your own price?*

A. *Yes.*

Q. *You would take that as one of the guides, would you?*

A. *Yes, certainly* (R. 101).

Mr. Nolan of the National Lead Company expresses a very peculiar idea with reference to the conditions under which prices will become stationary or uniform. He says that in 1919 the crops in the Northwest were burning up, or were partially burnt up; that transportation conditions seriously affected the supply of flaxseed; that during several months in the early part of 1919 there was a railroad strike in Argentina which practically shut off the exportation of seed for nearly three months, and there were other conditions later during the summer that made it difficult to acquire supplies of seed, and a serious crop condition developed in the Northwest, both in Canada and in the United States. He then says, "If there was a stationary price I can see how it should have been," and that "it undoubtedly was due to an uncertainty in the minds of the people in the industry as to what was going to develop next" (R. 129). Apparently the very conditions existed that would naturally have brought about the widest fluctuations in the price of seeds; and that would have naturally resulted in corresponding fluctuations in the price of oil. Yet during nearly all of the months of July, August and September the prices *were practically uniform* at the prices of $2.10, $2.15, and $2.20.

CHART SHOWING VARIATIONS IN PRICES OF FLAXSEED, REPLACEMENT COSTS OF OIL, AND PRICES OF LINSEED OIL.

In the oral testimony introduced by defendants it is said a number of times that the price of linseed oil is controlled by the price of flaxseed.

The Government filed as Exhibit No. 6 a chart which shows the fluctuations in the prices of flaxseed, in the replacement costs of oil (excluding executive and selling expenses), and in the prices of oil, from October 1, 1918, to June 30, 1920. This exhibit is not printed in the record, it being there noted as illegible (R. 254); but the Government has had it photostated, and presents copies of same with the record.

This chart shows that the fluctuations in the prices of flaxseed were far more frequent and violent than were the fluctuations in the prices of linseed oil. In fact the prices of flaxseed varied almost daily, and from week to week the fluctuations often took a wide range. The same is true as to the replacement costs of oil, though the range was not so great, as other elements of expense, which were in a measure constant, entered into the cost of the production of oil. But fluctuations in the selling prices of oil were always gradual, except where there was a sudden and uniform rise or fall in quotations, as happened October 1, 1919, when the quotations of twelve of the subscribers dropped from $2.10 to $1.84, and of the other reporting subscriber from $2.09 to $1.84. Oftentimes the quotations would remain constant

for a considerable length of time, although the fluctuations in flaxseed during the same period were continuous and had a wide spread. The following table shows, month by month, during the year 1919 the price of flaxseed on the first day of the month, the highest and lowest prices during the month, the price on the last day, and the spread between the highest and the lowest prices, and also the same data with reference to the replacement costs of oil and the prices of oil. However, the relative stability *from day to day* of these prices and costs can only be fully understood from an inspection of the chart.

	First day.	Highest.	Lowest.	Last day.	Range.
January:					
Flaxseed	3.57	3.64	3.20	3.26	0.44
Replacement cost	1.24	1.26	1.02	1.11	.24
Oil	1.53	1.53	1.43	1.43	.10
February:					
Flaxseed	3.26	3.67	3.26	3.67	.41
Replacement cost	1.11	1.27	1.11	1.27	.16
Oil	1.435	1.435	1.43	1.43	.005
March:					
Flaxseed	3.67	3.84	3.64	3.79	.20
Replacement cost	1.27	1.36	1.27	1.34	.09
Oil	1.43	1.48	1.43	1.48	.05
April:					
Flaxseed	3.79	4.06	3.76	3.92	.30
Replacement cost	1.34	1.44	1.25	1.37	.19
Oil	1.48	1.56	1.48	1.56	.08
May:					
Flaxseed	3.92	4.36	3.92	4.30	.44
Replacement cost	1.37	1.52	1.35	1.52	.17
Oil	1.55	1.59	1.55	1.59	.04
June:					
Flaxseed	4.30	5.40	4.30	5.39	1.20
Replacement cost	1.52	1.87	1.52	1.87	.35
Oil	1.59	1.88	1.59	1.88	.29
July:					
Flaxseed	5.39	6.22	5.37	6.04	.85
Replacement cost	1.87	2.16	1.86	2.06	.30
Oil	1.93	2.19	1.93	2.19	.26
August:					
Flaxseed	6.04	6.15	5.18	5.46	.97
Replacement cost	2.06	2.09	1.66	1.82	.43
Oil	2.20	2.20	2.20	2.20	.00

	First day.	Highest.	Lowest.	Last day.	Range.
September:					
Flaxseed	5.46	5.52	4.04	4.04	1.48
Replacement cost	1.82	1.85	1.36	1.36	.49
Oil	2.10	2.10	2.10	2.10	.00
October:					
Flaxseed	4.04	4.50	3.77	4.39	.73
Replacement cost	1.36	1.53	1.25	1.46	.28
Oil	1.84	1.84	1.70	1.70	.14
November:					
Flaxseed	4.39	5.14	4.39	5.14	.75
Replacement cost	1.46	1.71	1.46	1.70	.25
Oil	1.70	1.75	1.70	1.75	.05
December:					
Flaxseed	5.14	5.52	4.63	4.69	.89
Replacement cost	1.70	1.88	1.49	1.53	.39
Oil	1.76	1.85	1.76	1.85	.09

ARGUMENT.

The Government's contention is that the purpose of the combination between defendants was, by making uniform the practices incident to the marketing of their products and by continuously keeping each other informed as to their prices and subjecting themselves to a searching examination as to every transaction, to eliminate competition between the defendant manufacturers as to prices and practices, and to prevent thereby the reduction, and to secure advancements of prices; and that the necessary result of the operation of the system was a very substantial increase in the prices of linseed oil over what they would have been had the naturally competitive conditions continued; and, further, that the evidence conclusively shows that the intended and natural result of the system was fully accomplished.

It will be observed that the record fails to disclose that any special attention was given to production.

The reason is that the production of linseed oil is limited by the quantity of flaxseed on the market, an excessive overproduction of oil being therefore very improbable. In this respect the industry is unlike that of lumber, in which the raw material is, for the present at least, unlimited.

A brief recapitulation of some of the things done and incidental results accomplished in the working of the system will be helpful in estimating what was the combined effect of all of its activities.

It is unnecessary to further mention the zoning system or the meetings of the council, as they have been sufficiently considered in citing the evidence relating to those features.

The defendants' witnesses were careful to repeatedly deny that they had in mind when they contracted with the Bureau the fixing of prices; and it can be plausibly argued that there was no specific agreement that the members or any number of them would sell at any time at a stipulated price. But the evidence does not admit of a doubt that the control and increase of prices so that a greater profit could be realized was the prime object of the organization, and was the actual result of its operation.

The requirements with reference to statistics constitute the basis upon which the system rests. It is this feature that gives the system, and all devices of like character, the designation of a plan for "open competition," meaning an organization composed

of a group of those producing or handling the same article wherein each is required to reveal to the others every detail of his business. Manifestly the word "competition" as used under such circumstances is a mere camouflage to conceal the real purpose of the organization.

The reporting system required under the contract between the Bureau and each subscriber is unusually exacting. It requires that all published price lists of a member shall be "*immediately*, and when and as hereafter issued," deposited with the Bureau.

It was frequently said by defendants' witnesses that the Bureau made no inquiry as to, and would not permit a report of, a transaction before it was actually had. But certainly a price list *is the basis for all future sales* until it is changed. Therefore the Bureau required of each member that it file the prices at which it then intended to sell its products *in the future;* and this price list was known to every other member.

The members were then required to report to the Bureau *by wire*, and confirm by letter, all quotations made at variance with the price list *which gave "better terms to the contemplated purchaser than those quoted."* Why were they required to report all *cuts* in prices, and not required to report sales at prices in excess of those given in the price list? Of course it was because they were specially concerned in preventing *the cutting* of prices, while it was quite proper, in their minds, to sell *above* the filed price.

It was also required that where the sale was equal to or in excess of a carload the member should report the prospective buyer's name, address and f. o. b. point of shipment, and he also agreed to give in every instance the terms and discounts, whether made to jobber, dealer or consumer, the quantity of the sale, and whether it was made at warehouse or mill prices; and to promptly report all changes in and alterations or withdrawals of a quotation, and to give full information with reference to every special quotation. In other words, in these daily reports *by wire* and confirmed by letter there was nothing connected with any sale *at a less price* than that designated in the price list which was not required to be fully disclosed to the Bureau. In addition to these reports by wire, every subscriber was required to make a daily report of all carload sales for that day, giving particulars; and was required to report weekly all of its sales into each zone made during that week, setting forth specifically the quantity sold and the price at which sold, differentiating between that sold for spot and that for future delivery, and giving the period for the future sales. The Bureau agreed that "all of the foregoing market information as received by the Bureau *will be promptly cleared and relayed by it to the undersigned subscriber and to all other subscribers in good standing.*" The evidence shows that a few minutes' delay in transmitting a report to the Bureau at times brought forth severe criticism; and that in

fact the reports of quotations deviating from prices were made by the member nearly always within from five to thirty minutes after the quotation had been made, and was relayed by the Bureau within five to twenty minutes after received, and finally, as shown by the list of reports made by the Archer-Daniels Company and filed as plaintiff's Exhibit No. 17, it was required of that company that it report contemplated cuts in price before the reduced quotations were actually made.

What possible explanation is there for this exchange of information as to every cut in price by every individual member to all of its competitors within a few minutes after it was made, other than that it was done to influence the prices at which each member would sell his products. Its inevitable tendency certainly was to prevent any cut in prices, and to cause every member to sell either at, or higher than, his filed prices. Now and then an agent of a member, moved by the natural spirit of competition, would undertake to meet a lower price of a competitor, but this brought forth at times severe censure from the Bureau, which urged that a member should show a spirit of independence by giving no attention to a competitor's price, but selling strictly at his own. This subject appears to have been discussed at the meeting held September 18, 1919; from which it appeared that it was the consensus of opinion that the point of ethics raised should be observed (R. 487).

To make certain that there would be no secret deviation by a member from his filed price he was

required to open for inspection all of his books and accounts, and to reply specifically to any inquiry that might be made through the Bureau by another member.

This latter requirement was frequently made use of, and proved a very potent agency in procuring the maintenance of the prices designated in the filed price list. How effective this was will appear from a citation of some incidents concerning the prices and practices of members.

(1) At the very beginning of the organization, by exchange of views through the Bureau, fluctuations in the price of linseed oil were very quickly and materially reduced, and the prices of all the members soon became practically uniform.

(2) By correspondence, views were exchanged as to how to apply the zoning system to car lots and less than car lots (R. 386, 402).

(3) On November 9, 1918, one member by writing the Bureau secured the reprimand of an agent of another member for selling two barrels of oil at $1.53, when that member's filed price was $1.58 (R. 354).

(4) In the same manner a reprimand of the agent of another member was obtained for quoting a price f. o. b. St. Louis instead of 4¢ higher f. o. b. New Orleans (R. 361, 362).

(5) In like manner an agent at St. Louis was stopped from selling a few small orders to meet what he was informed was the actual price of a competitor (R. 371, 376).

(6) It also appears in a letter from the Midland Company to the Bureau that *the council* had decided to use the price of oil in barrels, carload lots, as the basic price (R. 376).

(7) Through correspondence an understanding was procured that a subscriber would not sell one day at the prevailing price with the understanding that the order would not be turned in for forty-eight hours, the purchaser to get the benefit of a reduction but not charged with an advance; and would not for a premium of 1¢ per gallon protect a purchaser for thirty days against decline as to any undelivered portion (R. 380, 391–3).

(8) On complaint two members stopped selling oil in Washington at the Baltimore price and thereafter added freight between the two points (R. 420, 422, 440).

(9) As a result of lengthy and rather heated correspondence a sale of five barrels made by an agent of a member at Albany at $1.52 instead of $1.53, the filed price, was canceled (R. 437–8).

(10) Also an agent of a member was stopped from selling oil stored at Syracuse to be shipped to Minetto, N. Y., at the Syracuse price, thus absorbing the freight; and it also appeared in the same correspondence that the council by resolution had limited the application of zone prices to points where warehouse stocks were carried (R. 441, 445).

(11) Sharp criticism was directed against one member by two others because one of its agents had

made *two* mistakes in making sales at 5¢ under the company's filed price for zone 3, and likely no further mistakes were made by that agent (R. 467).

(12) An outside crusher had offered a customer oil at $2.13, to be delivered August 27. A member's agent offered to meet this price, but failed in transmitting the order to direct that the shipment be held up till September ($2.13 apparantly being that member's filed price for September), and the member wrote the Bureau that it was holding the matter open till it heard what the price there of another member was. This action of the member was the subject of a severe reprimand by the Bureau, it saying that by such procedure "we are just naturally taking the backbone out of our sales force and substituting a rubber composition" (R. 475, 476).

(13) Subsequently, by correspondence, all the members expressed a determination not to deliver in one month sales made for a subsequent month (R. 482, 485);

(14) And afterwards on complaint an agent of a subscriber was stopped from shipping oil in December on sales made for January (R. 572, 595).

(15) On complaint a sale made by an agent at $1.60 was by the member changed to $1.61, its filed price (R. 502, 505).

(16) By criticism from one member the agent of another member was stopped from selling small lots at a price filed for carload lots (R. 509–10).

(17) The filed price of a member was $1.70 for March in zone 1, *if taken in equal quantities with*

deliveries for April and May at prices for those months. A sale by the agent of a member at $1.70 for March *not accompanied with orders for April and May* was criticised by another member because not in accord with the filed price of the offending member, and the agent was written that he had exceeded his authority; and such sales were, of course, stopped (R. 544, 552).

(18) An agent made a mistake in quoting $1.70 for South Bend, overlooking that it was in zone 2, the filed price for which was $1.71. The customer on representation of the member was induced to permit the order to be changed to $1.71 (R. 563, 573, 574, 577).

(19) On complaint an agent of a member was stopped from selling English oil at prices under the member's filed price (R. 602, 603).

In like manner practices some of which involved prices were criticised and corrected, as appears from the following:

(1) By correspondence an understanding among the members was secured that all would charge 1¢ per gallon per month or fraction thereof for carrying oil after purchased (R. 576).

(2) A Kansas City agent of a member was stopped from guaranteeing against decline (R. 383, 387).

(3) Because of an inquiry with reference to a certain sale by a member, thereafter when a sale was for export the member so reported, which appears from the correspondence to have been previously agreed upon by the members (R. 409, 412).

(4) On inquiry of one member expressions were obtained from all but one condemning an arrangement of selling oil on consignment, and for consideration of storage the purchaser could at his option take it out of his warehouse at carload price, having the oil invoiced on date of its removal from the stock, which arrangement would enable him to take the entire lot when delivered to his warehouse, if he felt that prices were going to advance, or he could take it at carload price as used; and the subject was of such importance that it was docketed for discussion at the next meeting (R. 418, 429).

(5) On complaint of one member that another member had taken a sale from him by waiving the customer's giving a trade acceptance a number of members wrote the Bureau that they had adopted trade acceptances, one stating that if the subscribers would follow the "procedure recommended more progress would be made" (R. 452, 457, 461).

(6) To avoid further criticism a member ceased storing its oil in a house owned by a customer, the criticism being that by thus patronizing a customer such member would have an advantage over its competitors (R. 458, 459).

(7) The practice of allowing a customer 5¢ for shipment in customer's containers was criticized and declared entirely wrong; and the member criticized stopped the practice (R. 534, 541, 554).

(8) A member having a tank station in a city adopted the rule that buyers of carload lots might have their goods placed in a car and switched to the

buyer's siding or to the railroad delivery tracks, which could be done within twenty-four hours after receiving an order; and the invoice would be dated on the day after the loading, and the discount allowed from that date. A member complained of this arrangement, claiming that it was the understanding that it could not be made except in mill towns, the agency mentioned not being in a mill town; and it was further complained that the purchaser to obtain discount should be allowed thirty days from *the loading* of the car. As a result of this complaint the member wrote its agent directing the discontinuance of the practice (R. 557, 571).

(9) A member was accused of having allowed 5¢ off when purchasers furnished their own barrels. On inquiry by the member the agent declared he was not doing so (R. 559, 574). This shows that no such practice was allowed by any of them.

(10) Because of criticism in a meeting a member directed its agent "to make no cartage allowance on full carload deliveries where same is made in a car at the siding of this concern" (R. 577).

It conclusively appears, therefore, that by the exercise of this right of inquiring into and criticising every business transaction of a member the strictest adherence to filed prices was procured, and in numerous instances the prices of sales actually made were changed; and that every practice or device whereby one member might procure a little advantage over another was eliminated. If it be suggested that the number of complaints cited are few in com-

parison with the number of transactions that must have been had, the reply is that the character of complaints of members and criticisms of the Bureau, and their effect upon the members criticised were such as to clearly show that a violation of the contracts between the members and the Bureau or of the regulations of the Bureau was exceedingly rare.

Attention is specially called to a feature which does not usually appear in mere associations. In such organizations reliance is usually had for the enforcement of their regulations upon the reporting system and the agreement to permit inspection of the members' records; but here noncompliance with the members' obligation was subject to a severe penalty, the collection of which was absolutely secured. Each member is required to deposit Liberty bonds at the rate of $1,000 par value for every six presses or fraction thereof, the amount of such deposit in no instance to be less than $1,000 nor more than $10,000; and it was provided that should the subscriber "fail, in any manner whatsoever, to comply with any of the terms of this agreement or with any and all reasonable requirements of said bureau, then it shall and does hereby forfeit to said bureau, at its election, all money paid for services and all further benefits and rights under this agreement." The Bureau was required to give notice of such forfeiture, and the member had the right of appeal from such action to three members chosen as prescribed in the contract, whose decision was to be final. Thus each

member subjected himself to a penalty, security for its payment having been put upon deposit, for violating, not only the terms of his contract, but *any reasonable requirement of the Bureau;* and whether or not a requirement was reasonable was to be determined, first by the Bureau, and second, on appeal by the member, by three of his competitors.

REAL DIFFERENCE BETWEEN COMPETITION CONTEMPLATED BY THE SHERMAN ACT AND SO-CALLED "CONSTRUCTIVE" COMPETITION.

The competition which it was intended by the Sherman Act to preserve was that existing in the economic world at the time of its enactment; and which had always existed and continued to exist, except as now and then interfered with by unlawful agreements, down to the organization of latter day associations and bureaus. Economists then supposed that prices were regulated by the law of supply and demand. Of course the price of an article was necessarily based on the cost of producing and selling it. It could not for any substantial length of time be sold at a price under cost of production and marketing; but the producer's profit depended upon the amount he could realize in excess of costs, and that was controlled by the demand and the supply in the market. The producer then sought to manufacture his article at the lowest cost possible. He would figure a reasonable profit upon that cost, and would be satisfied if he could receive the amount thus determined. If he had an advantage in location; or for any reason

he could obtain his raw material more cheaply than a competitor; or had his factory so organized that he could produce the article more economically, the public received the benefit of those advantages, unless the demand was substantially in excess of the supply; in which event naturally he increased his price, thus temporarily realizing a larger profit. If this condition continued for a time others entered the field, and the production soon equaled or probably exceeded the demand; and then it became a question of the survival of the fittest. Under those conditions but little attention was given to the prices of competitors. When the market was active because the demand was great, prices naturally advanced; when business was depressed and demand lax, prices were reduced. Then producers were endeavoring to conceal every detail of their business from their competitors; and they were in ignorance of the details of each other's business except as they were accidentally revealed to them through agents, or possibly were obtained through some devious method. *All effort, therefore, was concentrated upon producing the goods as cheaply as possible, so that they could sell them upon the market against competition, and yet realize a reasonable profit;* and no dependence was had upon the prices of competitors.

Under the present system of so-called "constructive" competition a precisely contrary course is pursued. Each producer of an article reveals every detail of his entire business to every competitor. He

reports to him every sale, and the price at which it is made, and the locality to which it is shipped. They all agree upon terms of sale, and the amount that shall be charged to every locality in lieu of the freight from the mill to such locality. They adopt uniform practices with reference to storage, and conditions under which allowances shall be made. They then meet together and personally discuss every question relating to the production and distribution of the goods made by them. In other words, every producer is as familiar with the details of the business of his competitors as he is with those of his own business, or as they are with their business. Can anyone possessing intelligence sincerely contend that this revolution does not profoundly affect the economic laws governing prices which previously existed, and does not necessarily affect prices themselves? The result is that the producer now devotes his time to studying the business of his competitor instead of his own business. He interests himself in ascertaining whether his competitor has deviated at some point from an agreed uniform practice and in calling him upon the carpet to stop such deviation, rather than in figuring upon some means of reducing the cost of production. In determining upon prices he studies the price lists of his several competitors, ascertains what they are receiving for their goods in certain markets, and fixes his price therefrom instead of studying his cost sheet and determining what is a reasonable profit upon his investment.

If it be conceded that there are plausible arguments in support of this so-called "stabilization," which is nothing less than fixing prices, and of the effects of this so-called "constructive" competition, the debate over that question is purely an economic and not a legal one. The undoubted fact is that economic laws are profoundly affected by this new system; and the Sherman Act was passed to maintain the system governing competition then existing; and any fundamental change in practice by agreement between competitors whereby prices of articles moving in interstate commerce are substantially affected is a violation of that Act.

AUTHORITIES.

The combination between the defendants is unlawful, because when carried into effect it inevitably restrains interstate commerce.

It is unnecessary to cite but one authority in support of this proposition, and that is *American Column & Lumber Company* v. *United States*, decided by this Court on December 19, 1921. That case was an attack upon an association composed of lumber manufacturers whose plan for the exchange of information with reference to production and sales was of the same nature as the plan here presented, though differing somewhat in detail. There daily reports were made to the secretary of the association by each member, giving particulars as to all sales and shipments, and the information thus received was compiled by the secretary and sent out *weekly* to all the

members. Here reports of all *quotations at a reduced price* are wired *within a few minutes* to the Bureau, and by the Bureau *immediately* relayed by wire to all the other members. There monthly reports by the members to the secretary were required, which were compiled and distributed among the membership monthly. At one time there was a desire expressed among the members of the association to have semi-weekly reports, it being suggested that a week was too long to wait for information with reference to sales, but the association's counsel promptly advised against the change, warning them against too much activity along that line, as it would probably call forth criticism and action upon the part of the Government. Here repeated criticisms were made of members, because of delays *of a few minutes* in transmitting quotations. There the association held monthly meetings, as was done by the council in this case. However, for the convenience of the members, meetings were then held in different sections of the territory covered by the association, and for that reason there were sometimes two or three meetings a month, and some members probably attended more than one of them. The evidence in this case indicates a much more thorough inquiry by the members into each other's business at the meetings of the council than was there shown to have occurred in the meetings of the association. In that case emphasis was laid by the court upon the fact that the general manager from time to time sent out market letters in which he under-

took to detail the conditions of the industry and demonstrate to the membership that prices should not be reduced but maintained or increased. But the conduct of the manager in that case could not possibly have been so effective as the communications from the Bureau to its subscribers as shown by the evidence in this case. There the manager only advanced an argument based upon facts, or assumed facts. Here the Bureau at times gave peremptory orders, and in all cases spoke as one having authority. And to supplement the advice and dictation of the Bureau were the inquiries through the Bureau by members calling in question individual transactions of other members, which at times subjected a member to severe criticism both from the Bureau and from other members. Certainly in the *Lumber case* the minute details of the business of the members were not laid bare to the extent that such details are shown to have been exposed among the members of the council in this case. It was there insisted by the defendants that the evidence was not sufficient to warrant the inference that an agreement as to curtailment of production or as to prices had been made by the several members. But the Government's contention was that while it could well be inferred from the evidence that there was an agreement to curtail production and advance prices, yet it was unnecessary for such inference to be drawn, because *the plan, within itself, was unlawful, in that when put into effect the inevitable result was the curtailment of production and*

the advancement of prices. This contention of the Government was upheld by the Court. As the opinion filed has not yet appeared in the official reports, the conclusions of the Court drawn from a consideration of the evidence will be quoted at length.

> It is plain that the only element lacking in this scheme to make it a familiar type of the competition suppressing organization is a definite agreement as to production and prices. But this is supplied: by the disposition of men "to follow their most intelligent competitors," especially when powerful; by the inherent disposition to make all the money possible, joined with the steady cultivation of the value of "harmony" of action; and by the system of reports, which makes the discovery of price reductions inevitable and immediate. The sanctions of the plan obviously are, financial interest, intimate personal contact, and business honor, all operating under the restraint of exposure of what would be deemed bad faith and of trade punishment by powerful rivals.
>
> The principles of law by which we must judge *of the legality of the scheme of doing business thus provided for, as it was worked out in practice,* are clearly settled by the anti-trust statute and the decisions of this Court interpreting it.
>
> The applicable provision of the act (26 Stat., Chap. 647, 209) reads:
>
> "SECTION 1. Every contract, combination in the form of trust or otherwise, or conspiracy,

in restraint of trade or commerce among the several States * * * is hereby declared to be illegal."

Obviously the organization of the defendants constitutes a combination and confessedly they are engaged in a large way in the transportation and sale of lumber in interstate commerce so that there remains for decision only the question whether the system of doing business adopted resulted in that direct and undue restraint of interstate commerce which is condemned by this anti-trust statute.

It has been repeatedly held by this Court that the purpose of the statute is to maintain free competition in interstate commerce and that any concerted action by any combination of men or corporations *to cause, or which in fact does cause,* direct and undue restraint of competition in such commerce falls within the condemnation of the act and is unlawful.

* * * * *

Such close cooperation, between many persons, firms, and corporations controlling a large volume of interstate commerce, as is provided for in this "Plan," is plainly in theory, as it proved to be in fact, inconsistent with that free and unrestricted trade which the statute contemplates shall be maintained, and that the persons conducting the association fully realized this is apparent from their protesting so often as they did, in many of their confidential communications appearing in this record, that their purposes were not unlawful, that they sought only to supplant cutthroat competition

with what in their own judgment would be "fair and reasonable competition," and to obtain, not make, fair prices, and by their repeated insistence that the Sherman Law "designed to prevent the restraint of trade is itself one of the greatest restrainers of trade, and should be repealed."

To call the activities of the defendants, as they are proved in this record, an "Open Competition Plan" of action is plainly a misleading misnomer.

Genuine competitors do not make daily, weekly and monthly reports of the minutest details of their business to their rivals, as the defendants did; they do not contract, as was done here, to submit their books to the discretionary audit and their stocks to the discretionary inspection of their rivals for the purpose of successfully competing with them; and they do not submit the details of their business to the analysis of an expert, jointly employed, and obtain from him a "harmonized" estimate of the market as it is and as, in his specially and confidentially informed judgment, it promises to be. This is not the conduct of competitors but is so clearly that of men united in an agreement, express or implied, to act together and pursue a common purpose under a common guide that, if it did not stand confessed a combination to restrict production and increase prices in interstate commerce and as, therefore, a direct restraint upon that commerce, as we have seen that it is, that conclusion must inevitably have been inferred from the facts which were proved. To pronounce

such abnormal conduct on the part of 365 natural competitors, controlling one-third of the trade of the country in an article of prime necessity a "New form of competition" and not an old form of combination in restraint of trade, as it so plainly is, would be for this court to confess itself blinded by words and forms to realities which men in general very plainly see and understand and condemn, as an old evil in a new dress and with a new name.

The "Plan" is essentially simply an expansion of the gentleman's agreement of former days, skilfully devised to evade the law. To call it open competition because the meetings were nominally open to the public, or because some voluminous reports were transmitted to the Department of Justice, or because no specific agreement to restrict trade or fix prices is proved, cannot conceal the fact that the fundamental purpose of the "Plan" was to procure "harmonious" individual action among a large number of naturally competing dealers with respect to the volume of production and prices, without having any specific agreement with respect to them, and to rely for maintenance of concerted action in both respects not upon fines and forfeitures as in earlier days, but upon what experience has shown to be the more potent and dependable restraints, of business honor and social penalties—cautiously reinforced by many and elaborate reports, which would promptly expose to his associates any disposition in any member to deviate from the tacit understanding that all were to act together

under the subtle direction of a single interpreter of their common purposes, as evidenced in the minute reports of what they had done and in their expressed purposes as to what they intended to do.

In the presence of this record it is futile to argue that the purpose of the "Plan" was simply to furnish those engaged in this industry, with widely scattered units, the equivalent of such information as is contained in the newspaper and Government publications with respect to the market for commodities sold on boards of trade or stock exchanges. One distinguishing and sufficient difference is that the published reports go to both seller and buyer, but these reports go to the seller only; and another is that there is no skilled interpreter of the published reports, such as we have in this case, to insistently recommend harmony of action likely to prove profitable in proportion as it is unitedly pursued.

Convinced, as we are, that the purpose and effect of the activities of the "Open Competition Plan," here under discussion, were to restrict competition and thereby restrain interstate commerce in the manufacture and sale of hardwood lumber by concerted action in curtailing production and in increasing prices, we agree with the District Court that it constituted a combination and conspiracy in restraint of interstate commerce within the meaning of the Anti-trust Act of 1890 (26 Stat. 209) and the decree of that court must be

Affirmed.

We insist that there was not an element present in that case that does not here exist in an equally, or more, aggravated form, and that therefore that case is controlling of the present one.

It has been repeatedly held that any combination which necessarily results in a restraint of interstate commerce is violative of the Anti-Trust Act regardless of how innocent the intention of the parties thereto may have been.

> *United States* v. *Freight Association*, 166 U. S. 290, 341;
>
> *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 211, 243;
>
> *United States* v. *St. Louis Terminal Co.*, 224 U. S. 383, 394;
>
> *United States* v. *Reading Co.*, 226 U. S. 324, 370;
>
> *United States* v. *Patten*, 226 U. S. 525, 543;
>
> *Standard Sanitary Mfg. Co.* v. *United States*, 226 U. S. 20, 49.

Unlawful to agree upon practices.

It is just as unlawful to agree upon practices as upon prices, as conveniences and favors to the trade suffer because of the elimination thereby of all competition in practices. As said by this Court in *United States* v. *Union Pacific R. R. Co.*, 226 U. S. 61, 88, with reference to the consolidation of competing lines of road:

> It directly tends to less activity in furnishing the public with prompt and efficient service in carrying and handling freight and in carrying passengers, and in attention to and prompt

adjustment of the demands of patrons for losses, and in these respects puts interstate commerce under restraint. Nor does it make any difference that rates for the time being may not be raised and much money be spent in improvements after the combination is effected. It is the scope of such combinations and their power to suppress or stifle competition or create monopoly which determines the applicability of the act.

The restraint resulting from the combination was an unreasonable and unlawful restraint.

It may be insisted that the activities of the Bureau resulted only in enabling the subscribers to obtain reasonable prices for their products; and, therefore, that while interstate commerce may have been restrained to some extent, yet the restraint was reasonable. It has been assumed by some of the lower courts that in speaking of a reasonable restraint in the *Standard Oil case*, 221 U. S. 1, Mr. Chief Justice White had reference to the *amount* of the restraint of interstate commerce. However, a careful consideration of that opinion shows that the learned Chief Justice had in mind the character of the agreement or combination which produced the restraint, and not the extent of the restraint resulting therefrom. This appears from the following language of the Court:

> Without going into detail and but very briefly surveying the whole field, it may be with accuracy said that the dread of enhancement of prices and of other wrongs which it was thought would flow from the undue limita-

> tion on competitive conditions caused by contracts or other acts of individuals or corporations, led, as a matter of public policy, to the prohibition or treating as illegal all contracts or acts which were unreasonably restrictive of competitive conditions, *either from the nature or character of the contract or act* or where the surrounding circumstances were such as to justify the conclusion that they had not been entered into or performed with the legitimate purpose of reasonably forwarding personal interest and developing trade, but on the contrary *were of such a character as to give rise to the inference or presumption that they had been entered into or done with the intent to do wrong to the general public and to limit the right of individuals,* thus restraining the free flow of commerce and tending to bring about the evils, such as enhancement of prices, which were considered to be against public policy. (221 U. S. 58.)

Through misapprehension, there was considerable criticism in the press and among public men of the statement by the Court in that case that the Act should be interpreted by the "rule of reason"; and the Chief Justice, in the opinion subsequently delivered in the case of *United States* v. *American Tobacco Company,* 221 U. S. 179, took occasion to thus explain what was meant in the former opinion:

> It was therefore pointed out that the statute did not forbid or restrain the power to make *normal and usual contracts* to further trade by resorting to all *normal methods,* whether by

> agreement or otherwise, to accomplish such purpose. In other words, it was held, not that acts which the statute prohibited could be removed from the control of its prohibitions by a finding that they were reasonable, but that the duty to interpret which inevitably arose from the general character of the term "restraint of trade" required that the words "restraint of trade" should be given a meaning which would not destroy the individual right to contract and render difficult if not impossible any movement of trade in the channels of interstate commerce—the free movement of which it was the purpose of the statute to protect.

But there has been no clearer exposition of the law upon this subject than that given in the opinion of the Circuit Court of Appeals of the Sixth Circuit in the case of *United States* v. *Addyston Pipe & Steel Co.*, 85 Fed. 271, 282. After a comprehensive review of all the common-law authorities bearing upon the question of restraint of trade, and an enumeration of certain classes of contracts which had been held valid because reasonable, the Court said:

> It would be stating it too strongly to say that these five classes of covenants in restraint of trade include all of those upheld as valid at the common law; but it would certainly seem to follow from the tests laid down for determining the validity of such an agreement that no conventional restraint of trade can be enforced unless the covenant embodying it is merely ancillary to the main purpose of a

lawful contract, and necessary to protect the covenantee in the enjoyment of the legitimate fruits of the contract, or to protect him from the dangers of an unjust use of these fruits by the other party. In *Horner* v. *Graves*, 7 Bing. 735, Chief Justice Tindal, who seems to be regarded as the highest English judicial authority on this branch of the law (see Lord Macnaghten's judgment in *Nordenfelt* v. *Maxim Nordenfelt Co.* [1894], App. Cas. 535, 567), used the following language:

"We do not see how a better test can be applied to the question whether this is or not a reasonable restraint of trade than by considering whether the restraint is such only as to afford a fair protection to the interests of the party in favor of whom it is given, and not so large as to interfere with the interests of the public. Whatever restraint is larger than the necessary protection of the party requires can be of no benefit to either. It can only be oppressive. It is, in the eye of the law, unreasonable. Whatever is injurious to the interests of the public is void on the ground of public policy."

This very statement of the rule implies that the contract must be one in which there is a main purpose, to which the covenant in restraint of trade is merely ancillary. The covenant is inserted only to protect one of the parties from the injury which, in the execution of the contract or enjoyment of its fruits, he may suffer from the unrestrained competition of the other. The main purpose of the contract suggests the measure of protection

needed, and furnishes a sufficiently uniform standard by which the validity of such restraints may be judicially determined. In such a case, if the restraint exceeds the necessity presented by the main purpose of the contract, it is void for two reasons: First, because it oppresses the covenantor, without any corresponding benefit to the convenantee; and, second, because it tends to a monopoly. But where the sole object of both parties in making the contract as expressed therein is merely to restrain competition, and enhance or maintain prices, it would seem that there was nothing to justify or excuse the restraint, that it would necessarily have a tendency to monopoly, and therefore would be void. In such a case there is no measure of what is necessary to the protection of either party, except the vague and varying opinion of judges as to how much, on principles of political economy, men ought to be allowed to restrain competition. There is in such contracts no main lawful purpose, to subserve which partial restraint is permitted, and by which its reasonableness is measured, but the sole object is to restrain trade in order to avoid the competition which it has always been the policy of the common law to foster. (85 Fed. 282–3.)

The relief that should be granted.

The relief that should be granted in this case is an adjudication that the combination described in the bill and proven in the evidence is unlawful *in toto*, and an injunction inhibiting any further operation under the plan as a whole or under any part thereof.

The holding of this Court in the *Hardwood case* is conclusive of this question. In that case the Court declared the whole scheme a nullity, and enjoined the defendants from engaging in any of the activities provided for in the plan. An earnest effort was made upon the hearing to have the Court enjoin the defendants from doing only such acts as were within themselves unlawful, and to permit a continuation of other parts of the scheme. That is, the Court was asked to determine how much of the plan it was necessary to eliminate in order to bring the activities of the association within the law. This the Court refused to do. A petition for a rehearing was filed as to this feature of the injunction, but the petition was overruled. No other view can properly be taken. If the plan adopted by the Bureau is unlawful, then it is void *as a whole*, though some particular features, standing alone, might be lawful. As held in the case of *Swift* v. *United States*, 196 U. S. 375, 396, whatever may be thought of the constituent elements separately, when taken as a whole they constitute an unlawful combination; and the Court will not undertake to construct a system which may be put into effect by the defendants.

JAMES M. BECK,
Solicitor General.
JAMES A. FOWLER,
Special Assistant to the Attorney General.

FEBRUARY, 1923.

O

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No. 807

IN THE
Supreme Court of the United States.

OCTOBER TERM, 1922

UNITED STATES OF AMERICA, APPELLANT

v.

AMERICAN LINSEED OIL COMPANY, ET AL.

Appeal from the District Court of the United States for the Northern District of Illinois.

Brief on Behalf of

ANKENEY LINSEED MFG. CO.
ARCHER-DANIELS LINSEED CO.
MINNESOTA LINSEED OIL CO.
NORTHERN LINSEED OIL CO.
RED WING LINSEED OIL CO.
THE TOLEDO SEED AND OIL CO.
THE MANN BROS. CO.
ARMSTRONG BUREAU OF RELATED INDUSTRIES
JULIAN ARMSTRONG
MONTAGUE FERRY

JOHN WALSH
LOUIS A. SPIESS
Solicitors for Said Defendants.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1922

No. 307.

UNITED STATES OF AMERICA, PLAINTIFF

vs.

AMERICAN LINSEED COMPANY AND OTHERS,

DEFENDANTS.

BRIEF FOR DEFENDANTS

Ankeney Linseed Mfg. Co., Archer-Daniels Linseed Co., Minnesota Linseed Oil Co., Northern Linseed Oil Co., Red Wing Linseed Oil Co., The Toledo Seed and Oil Co., The Mann Bros. Co., Armstrong Bureau of Related Industries, Julian Armstrong and Montague Ferry.

This is an appeal on the part of the Government, from a decree of the District Court of the United States for the Northern District of Illinois in a suit tried in that Court before Hon. George A. Carpenter, District Judge, wherein after an opinion

and decree of the Judge on the merits, the bill of complaint was dismissed for want of equity.

The suit was instituted June 30, 1920 (R. 1), the trial commenced April 18, 1921 and concluded April 25, 1921, (R. 49), the Judge filed his written opinion November 1, 1921, the decree was entered December 3, 1921 (R. 48), and the appeal herein perfected March 18, 1922 (R. 161).

PARTIES AND PLEADINGS.

The defendants are (R. 1):

American Linseed Company, New York, N. Y.

Ankeney Linseed Mfg. Company, Des Moines, Iowa.

Archer-Daniels Linseed Company, Minneapolis, Minn.

William O. Goodrich Company, Milwaukee, Wis.

Hirst & Begley Linseed Company, Chicago, Ill.

Minnesota Linseed Oil Company, Minneapolis, Minn.

National Lead Company, New York, N. Y.

Northern Linseed Oil Company, Minneapolis, Minn.

Red Wing Linseed Oil Company, Red Wing, Minn.

The Sherwin-Williams Company, Cleveland, Ohio.

The Toledo Seed & Oil Company, Toledo, Ohio.

The Mann Bros. Company, Buffalo, New York.

Armstrong Bureau of Related Industries, Chicago, Illinois.

Julian Armstrong and Montague Ferry, both of Chicago, Illinois.

All of the defendant companies were engaged in the manufacture and sale in interstate commerce of linseed oil, cake and meal, and are commonly referred to in the record as crushers. The Armstrong Bureau of Related Industries is conducted by the defendant, Julian Armstrong. It is a Bureau which sells its services (hereinafter described) to groups of competitive manufacturers in different or related industries. The defendant crushers constituted such a group of competing manufacturers and were collectively referred to as the "Linseed Oil Industrial Council." The defendant, Ferry, was improperly made a party.

The Government prayed in its bill of complaint, that the court, upon final hearing decree and adjudge that the defendants have engaged in a combination and conspiracy to suppress competition among themselves in the sale of linseed oil, to enhance prices thereof, and to retard the lowering of prices, in the manner and by the means described in the bill in violation of the Act of Congress of July 2, 1890 (26 Stat. 209) commonly known as The Sherman Anti-Trust Act, and that the court thereupon issue its permanent injunction against the defendants and all persons unlawfully com-

bining and conspiring with them (R. 10).

All of the defendants answered the bill of complaint, either jointly or separately, in which they admitted that the defendant crushers were subscribers to and accepted the service of the Bureau, but denied that their conduct in that regard or their activities by reason of their affiliation with the Bureau constituted a combination or conspiracy in restraint of interstate commerce, or otherwise, and put at issue all the other material allegations of the complaint relative to the alleged combination and conspiracy. (R. 11-41).

FINDINGS OF FACT AND OPINION OF THE TRIAL JUDGE

The suit was not tried upon depositions, nor was there a reference to a Master, but all the witnesses were sworn and all the testimony was introduced in open court at the trial. All of the witnesses including representatives of each of the corporate defendants and the defendants Armstrong and Ferry, testified under the close attention and observation of the trial Judge, Hon. George A. Carpenter. After trial the Judge filed his written opinion (R. 42) which is as follows:

OPINION.

Carpenter, District Judge:

NOVEMBER 1, 1921.

In this case the United States, pursuant to the powers and duties imposed upon it by

the Sherman Anti-Trust Act, challenged as a combination or conspiracy a contract between the defendants, linseed-oil crushers, and the Armstrong Bureau.

The defendant, Julian Armstrong, in October, 1918, organized the Linseed Oil Council and operated it as a member of the Armstrong Bureau. The purpose of the council and bureau was to collect and furnish to the various members current quotations on linseed oil, the record of sale of oil, including price, statistics as to stocks on hand, crop conditions at home and abroad, and other information of interest or value to the manufacturers of linseed oil. The Armstrong Bureau entered into contracts with certain of the defendants and agreed to furnish them the foregoing information for a consideration.

Pursuant to these contracts the various subscribers daily reported their price lists to the bureau, and promptly sent word of any change. Other information was also furnished from time to time. The statements received and collected by the bureau were immediately sent out to all the members of the association.

The record discloses that the information collected and distributed by the bureau to its several members was of the kind which a sagacious business man secures, or endeavors to secure, in the operation of his enterprise. The information was true. The price lists

furnished were made in the regular course of business, and offered in good faith to customers or prospective customers. There was no proof that the members of the association ever, at the bureau meetings or at any other place, discussed prices or made agreements with respect to prices, and there was no evidence that the prices asked by any of the subscribers were not in accordance with the market price of flaxseed, upon which the price of linseed oil was based.

Production was not limited during the period the bureau was in operation. There was no proof of division of territory. There was no proof that the prices asked by the individual defendants were not fixed by them upon their own judgment, considering all factors affecting supply and demand. There was no proof showing that any member was under the slightest obligation or constraint to ask higher prices or maintain prices.

The main argument for the United States is that the operation of the bureau tended towards a stabilization or uniformity of price on any given day, which was not due to competition, in accordance with economic law.

Many tables of statistics were offered in evidence and read to the court, from which there appeared at times a striking similarity in price, and that changes in prices were made by substantially all the members coincidentally.

It appears further that the price of linseed oil is controlled by the price of flaxseed, and that the flaxseed market is an open one in which there are wide fluctuations as well as inactive periods.

The Government has not shown that there was artificial regulation of price, either by definite oral or written agreement or by tacit understanding.

Each individual crusher entering into a contract with the Armstrong Bureau specifically and expressly agreed that all information reported to the bureau or distributed by it should at all times be purely statistical and pertain only to past operations, and that the bureau should not be used to enable the constituent members to fix prices for the sale of linseed oil, cake, or meal; to limit the sale, production, or manufacture thereof or to divide the territory in which it was to be sold.

It is incumbent upon the Government to show by the clear preponderance of the evidence that the defendants conspired to restrain interstate commerce. In the absence of direct proof of actual entering into of such a combination, and in the face of the denial under oath of the defendants that any such conspiracy or combination was entered into or made, the Government must show that what the defendants did necessarily had the result of restraining trade, or, if it relies upon the circumstancial evidence to show

that a conspiracy was actually entered into, it must show to the satisfaction of the court that the circumstances upon which reliance is placed are entirely inconsistent with supposition of innocence.

The question involved is whether an association, such as the Armstrong Agency (sometimes called the open-price plan), is obnoxious to the antitrust laws, whether or not there is anything inherently wrong in an agreement between producers in a certain line to furnish each other their prices, and not to make any sale deviating from the price list without immediately notifying all the others.

Associations of merchants and manufacturers, boards of trade, and exchanges are of great antiquity. Evidently such associations were not aimed at by the Sherman Act, because they are not mentioned in the act. *A distinction is sought to be drawn between the operations of an exchange and what was done by the defendants through the Armstrong Bureau. An exchange sends out reports of actual sales. The Armstrong Bureau gave out price lists.* It is difficult to understand any ground for declaring one legal and the other illegal. Every producer or merchant desires to obtain for his goods the highest price he can get. The price which he charges is always the highest which he believes the traffic will bear. He cannot charge ordinarily more than his competitors. His competitors' price fixes the point above which he cannot go. When the merch-

ant fixes the price at the level of his competitors, he is fixing it in competition with his rival just as much as though he had named a lower price. The competition of his rival has prevented him from charging a higher price. If, on the other hand, he finds that he cannot move his goods at the price fixed by his competitors, he will naturally lower the price and this will establish a new level. This is the essence of what constitutes competition.

Quotations established by the sales on an exchange establish the market value at the time of the sale, but not the market value the day after. The prices at which goods are offered for sale at any moment establish the market value at that moment.

In those lines of merchandising where there are no exchanges the prices which producers and dealers put upon their goods constitute the market price. Cliquot's Champagne, 3 Wall. 114. In the trial of that case the judge charged the jury as follows:

"The market value of goods is the price at which the owner of the goods, or the producer, holds them for sale, the price at which they are freely offered in the market to all the world; such prices as dealers in the goods are willing to receive and purchasers are made to pay when the goods are bought and sold in the ordinary course of trade."

This charge was approved by the Supreme Court.

The above language was cited and approved by the Supreme Court in Muser v. Magone, 155 U. S. 240, at page 249.

If it is lawful for dealers to get together in an exchange and provide for a dissemination of the prices obtained on actual sales, why should it be unlawful for those producers and dealers in lines where no public exchange has been established to make some provision for disseminating information of market value or prices? To put it in another way, why should they be limited to the dissemination of the market prices of yesterday but not those of today.

In order to obtain efficiency in business, as well as in any other human activity, it is necessary to have reliable, immediate, and adequate records. With the progress that has been made in the last century it is not to be expected that business alone stood still.

In the old days when at noon the business men of the community met in the village blacksmith shop, or in the evening met at the corner grocery, a man was supposed to carry in his head all the facts in regard to his business and never to disclose them to a competitor. Adequate systems of accounting had not been devised. Overhead as a cost element in operation was unheard of. Business was run by the rule of thumb. Such days have gone by. The commercial enterprise today which is not so managed that its head can at any time know how large is his stock, the volume

of his sales, the cost of his operation, and the amount of his profit and loss, sooner or later will be distanced by competitors.

It is because business is so much more complex, the volume so much greater, the margin of profit on single transactions so much less, that the merchants of today must have at instant command reliable and adequate information, immediately to be secured and more or less permanent in form. Business is no longer a game of chance, but a matter of scientific calculation.

A merchant cannot compete with another merchant unless he knows what he must compete against. A knowledge of what his competitor is charging is the first step in competition. It does not follow because one man knows the price which his competitor is asking, and he then fixes the same price, that his action is by agreement. If his competitor charges a high price, he naturally will ask the same price if he thinks he can get it. It is absurd to imagine that every merchant does not endeavor to keep posted on the prices asked by his competitor. If he fails to keep posted he will find himself losing money. If his prices are too high his customers leave him. If too low, he fails to reap the profit to which he is entitled. The Government cannot seriously contend that it is the duty of every merchant to guard against his competitor finding out what he is charging. It would be

an impossibility. Nor is it wrong for a merchant to endeavor to find out what his rivals are charging. If he cannot get it directly and easily, he will necessarily get it indirectly and at a great expense and slowly. He must know in order to conduct his business properly; nor does the public profit by the mistakes of a merchant charging too much on the one hand or too little on the other for want of such information. The mistakes would in all probability fall equally on either side.

Quick and accurate information of what his competitors are charging naturally leads to uniformity in prices. But because one merchant charges the same price that the other merchant charges because he finds that he can get it, does not necessarily indicate that there is any agreement between them to charge the same price. As the Supreme Court said, in the Steel Case, a uniformity in price does not prove a conspiracy.

What applies to sales for present delivery, applies equally to sales for future delivery.

Much has been made by counsel for the Government of the fact that prices of oil went up along with the price of flaxseed; that afterwards when flaxseed decined sharply, the price of oil did not come down at the same rate, but declined at a much slower pace. The court will take judicial knowledge that for the past several months a decline in prices has been going on. The Government has failed to show that the phenomenon of the price

of oil declining at a slower rate than the price of flaxseed was not common in other lines, where the price of raw materials has fallen. That the price of the finished product on a declining market will fall at a slower rate than the price of the raw material is natural, and therefore expected. The price of the finished material, under conceded economic rules in the market where there is competition, will depend upon the supply and demand of the finished material. The drop in the price of the raw material does not affect the supply of the finished material. Time must elapse before the supply of finished material is increased by the low prices of raw material and until the supply of finished material is increased, assuming that the demand remains constant, no decline in price may be expected. When the price of raw material starts to go up, less of the finished material will be produced, and stoppage or slowing up of the manufacture of the finished material will be at once reflected in an increased price.

The court should not construe the acts of the defendants to be illegal when it can, with equal facility, ascribe them to an innocent intention.

But it is charged by the Government that the defendants themselves claim that the effect of the bureau was to stabilize prices. That is to say, as a result of accurate and instant knowledge on the part of producers the price of linseed oil instead of varying sharply from

day to day, as shown by the sales made, assumed an average price without deviation. If these deviations before had been the result of real competition, based on accurate knowledge by the producers of the real market conditions then the Government is far from sustaining its contentions. *The defendants, however, have shown, and their evidence is uncontradicted, that the deviations before existing were caused by the individual producers endeavoring to meet prices of their competitors which had never been made; and it is common in the trade for buyers to make false representations as to prices by other producers.* Surely such a condition is not the one that the Sherman Act aims to foster.

The Government was greatly disturbed by a statement in the defendant Ferry's book that the Armstrong Bureau brought about a stabilized market. This expression seems to have been a great bugaboo. Counsel for plaintiff would have the court believe that the term "stabilized market" means nothing other than uniform prices. Whatever the proper definition of the phrase, the record does not show that there was a stabilization or uniformity in prices.

The defendants contend and I agree that the term "stabilized market" means the obtaining and distributing of any accurate information that would enable crushers and buyers of linseed oil the better to understand the conditions of the flaxseed and oil market, to

the end that the speculative hazards which formerly had worked injury to both seller and buyer would be minimized and eventually eliminated and the economic law of supply and demand be more intelligently put into operation.

Complaint is made against what is called the "zone system" and differentials applying thereto. It is true the prices quoted had reference to certain well-defined territory, and the prices were accompanied by differentials to equalize the cost of railroad transportation. The record shows that these differentials were adopted after a thorough and intelligent investigation of freight rates from the base point to point of delivery, and the addition to the base price in the different zones was arrived at after a fair averaging of those freight rates into the designated territory.

Zoning for the purpose of fixing rates is not new. The Interstate Commerce Commission permits it in regulating the charges to be made by railroads. It is not a perfect system, and there is always a certain amount of discrimination to those who live on or near the dividing line between zones, and I have no doubt a few buyers of oil may have been to some extent penalized, but every buyer had the option of purchasing f. o. b. point of manufacture or f. o. b. point of delivery, and I must assume that the buyer would choose that f. o. b. point which seemed the most to his advantage.

The charge of the Government that the zone differentials were adopted in order that the price charged for oil would be artificially enhanced and the defendant crushers consequently enriched is not borne out by the evidence. *There was no zone in which all the crushers did business, and the bulk of the finished product sold by the defendants was for delivery in zones carrying minimum freight differentials.*

Counsel for the Government seeks to draw an inference of guilt from the admission of defendants that the bureau allowed them to sleep nights. *The only restraint which the rules of the bureau on their face impose is that the members agree not to deviate from their price lists without informing the other members at once by telegraph. At the close of each business day every member knew until the next day what the market was.* It seems to me that the situation thus created is not dissimilar from that sustained by the United States Supreme Court in Chicago Board of Trade *v.* United States, 246 U. S. 231. It is very evident that the Supreme Court does not believe that the Sherman Act should prevent men from sleeping nights.

The Armstrong Bureau was organized solely for the purpose of furnishing information not only to the linseed oil crushers but to those interested in every other industry. It was a bureau of intelligence, and one which makes for real rather than artificial competition in

trade. There was no restriction placed upon any member. He was free to buy from and sell to whomever he chose. The bureau operated solely as to past transactions, and wherever there is freedom of contract on the part of the constituent members there cannot be a violation of the Sherman Act.

The prosecution deep down evidently believes that an association of producers or merchants must necessarily be obnoxious to the Sherman Act, because it affords an opportunity for the members to conspire to restrain trade.

Where there is such an association it is perfectly natural for members to express themselves as to conditions and prices; in fact, that is what the association is formed for, and these expressions have been seized upon by counsel as evidence to show that a corrupt agreement was actually made.

To my mind some of these expressions are evidence that no such agreement was in fact made, if they are evidence of anything. It would be perfectly natural, among a meeting of oil men, for some one to say that he thought prices ought to be higher. The meaning conveyed by such an expression would be that the man was at a loss to understand why prices were not higher, taking into consideration the demand and supply and conditions of the trade. I might well say today that the weather ought to be cooler without laying my-

self open to the imputation that the temperature had been fixed by an agreement of mine.

Logic which assumes that because there is an opportunity to fix prices, therefore prices are fixed, is contrary to the genius and theory of our law. Every man is presumed to be innocent until he is proved to be guilty. If the Armstrong Bureau is to be dissolved merely because it afforded an opportunity for the members to fix prices, then this court, with equal propriety, could be asked to dissolve any lunch club where business men meet. This theory hardly warrants discussion, and I would not mention it had I not been gravely urged in this case, that such was the underlying thought of the prosecution. It is the ancient fallax—post hoc propter hoc.

The bill will be dismissed for want of equity.

It will be observed that portions of the foregoing opinion are printed in italics. This is done to emphasize the point that such portions constitute specific findings upon all the evidence of ultimate facts proved in the suit, as found by the trial Judge, and to call attention of the Court to the well established rule or customary practice of Appellate Courts giving great weight and deference to the findings of trial judges as to questions involved, when the value of the testimony depends upon the appearance and manner of the witnesses when testifying, and such weight should be given to the findings of fact of the trial Judge upon

which the court based its conclusions that there had been no combination in restraint of trade or commerce, and no unlawful monopolization of such trade or commerce.

United States vs. United Shoe Machinery Co., of N. J., 247 U. S. 969.

See also Adamson vs. Gilliland, 242 U. S. 350.

Davis vs. Schwartz, 156 U. S. 631.

THE ARMSTRONG BUREAU OF RELATED INDUSTRIES.

The Armstrong Bureau of Related Industries is conducted at Chicago by the defendant, Julian Armstrong, and is in the nature of a public exchange through which the Bureau's clients, consisting of competing business institutions in the same industry, obtain market information and statistical data essential to the intelligent direction of competitive effort and individual business operation.

Mr. Armstrong is assisted in directing the work of the Bureau by an executive staff of professional men, among them being the defendant, Montague Ferry, whose success in securing better working conditions and relations between employers and employees, is an important departmental factor in the service rendered by the Bureau to its clients. (R. 75). A force of clerks under the direction of competent executives, carry on the clerical work of the Bureau.

None of the executives or employees of the Bureau are in any way connected with the business of the Bureau's clients or holders of their securities.

The Bureau was organized in 1916 (R. 134) by Mr. Armstrong, and since its existence it has served and is serving a number of other groups in no way connected with the linseed oil industry, but which, like the linseed oil industry, have no other open market or exchange except that furnished them by the Bureau.

Mr. Armstrong's special knowledge and experience as to the conditions of the flaxseed, linseed oil, paint and varnish markets, gained through his fifteen years' experience in the manufacture and sale of paints and varnishes, (R. 134), was an added factor in the intelligent direction of the Bureau's service to the linseed oil industry.

The service of the Bureau to the Linseed Oil Council began about October 1, 1918, and concluded about July 1st, 1920. The Council constituted all of the defendant manufacturers in this suit, and in addition thereto, two of the largest manufacturers in the industry, Spencer Kellogg Sons, Inc., Buffalo, and Midland Linseed Products Co., Minneapolis, these two concerns alone producing and selling more than 50% of all the linseed oil, cake and meal manufactured and sold in the country. In the early part of 1920, during the period

of the Bureau's service, these two concerns withdrew from the Bureau, for reasons fully disclosed hereafter in this brief. In addition to the transmission of statistical data hereinafter referred to, and the adjustment of labor conditions, the Bureau rendered service to the Linseed Oil Council in the matter of: (R. 137-138)

1. The War Industries Board.
2. Flax development.
3. Uniform loading plan worked out with the Master Car Builders' Association.
4. Tariff.
5. Standardization of linseed oil for purity.
6. Seeking recognition from the American Society of Testing Materials.
7. Foots or sediment (cause and prevention).
8. Grade of Foreign Oil.
9. Filtering oil methods.
10. Investigation and "trade conference" on fairness of selling oil on pound basis rather than gallon.
11. Costs.
12. Containers.
13. Second hand barrels.
14. Leakage.
15. Substitution steel barrels for wooden barrels.
16. Advertising wider use of meal as stock food.
17. Joint marketing of meal. (R. 136-137-138)

18. Advertising the activities of the Linseed Oil Council.

19. Campaign of explanation of the operations of the Bureau.

20. Publishing a trade journal.

21. Credit information.

Each client of the Bureau entered into a contract with the Bureau (R. 169-178) for its service, the character and objects of the service and the obligation of each party being enumerated therein. The court is earnestly invited to scrutinize the provisions thereof.

The gravamen of the complaint in this suit involves the exchange through the Bureau of statistical information as to the past transactions of each subscriber to the service of the Bureau. The provisions of the contract relative to statistical service are as follows:

> "STATISTICAL SERVICE—The statistical service so to be furnished by the 'bureau' shall be accomplished and provided by the use of special reporting forms conveying information on past transactions as outlined herein and which may be modified, changed, and others provided as experience suggests or as called for by the 'subscribers' in any of their meetings and approved by the 'bureau.'
>
> "DAILY MARKET INFORMATION — The undersigned and each 'subscriber' hereto agrees:

"(a) To immediately, and when and as hereafter issued, deposit with the 'bureau' all published price lists of the undersigned covering raw and boiled linseed oil, cake and meal;

"(b) Also to report to the 'bureau' by prepaid telegraph, and further confirm by mail, duplicate of all quotations made at variance with above price lists, giving better terms to the contemplated purchasers than those quoted;

"(c) With all reports made in compliance with the above paragraph 'b' of quotations which amount to one carload or more of oil, cake or meal, there shall also be reported at the same time and in the same manner the prospective buyer's name, address, and f. o. b. point of shipment;

"(d) In so far as the above reports 'a,' 'b,' and 'c,' do not disclose the following, the undersigned 'subscriber' agrees to give the following information in connection therewith, that is: the exact prices, terms, and discounts, and whether made to jobber, dealer, or consumer, and in what quantities, carload or less than carload, and warehouse or mill prices;

"(e) Also to promptly report all changes in and alterations or withdrawals of the above, of every kind whatsoever, that may be made;

"(f) Also to promptly report by prepaid telegraph, and further confirm by mail, all orders received by the undersigned 'subscriber' in response to special quotations made as

above provided in paragraph 'c,' designating the quotation which is the basis of such order and any variance therefrom.

REPORTS OF SALES.

"(a) DAILY SALES REPORT—Directly at the close of each day's business each 'subscriber' shall mail by special delivery to the 'bureau' a complete report of all its carload sales for that day of oil, cake or meal, not covered by its previous daily sales reports, which report shall disclose the quantity and kind, price and terms, and whether for immediate or future delivery, and if no sale has been made, this fact shall be likewise reported.

"(b) WEEKLY SALES REPORT—For the purpose of compiling this report a map of the United States shall be divided into zones as agreed upon by all of the 'subscribers' to this service, and each 'subscriber' at the conclusion of the week shall send to the 'bureau' by special delivery, not later than the following Monday night, a compiled report of all of its sales of oil, cake or meal into each zone made during the period covered by such report and not previously so reported, specifically setting forth the following:

"(a-a) Total gallons of oil sold into each zone, also showing the total gallons and price per gallon received for such oil sold;

"(b-b) Total tonnage of cake and meal sold into each zone, also showing total weight and price received per ton for such cake or meal sold.

"(c-c) Sales reports on both oil, cake and meal, shall differentiate spot and future delivery, giving period of such futures.

"REPORT OF STOCK ON HAND—The undersigned agrees on or before the 10th day of each calendar month to report to the 'bureau:'

"(a) The number of gallons of oil on hand not covered by sale or contract.

"(b) The total tons of meal or cake on hand not covered by sale or contract.

"All of the foregoing market information as received by the 'bureau' will be promptly cleared and relayed by it to the undersigned 'subscriber' and to all other 'subscribers' in good standing.

"SPECIAL MARKET INFORMATION—Any 'subscriber' who has made offerings or quotations to a prospective buyer and is advised by such buyer that it is not to be awarded such business shall have the right to immediately advise the 'bureau' of such unsuccessful offering or quotation giving all details of such bid or offering, and may then request the 'bureau' to bulletin all of its 'subscribers' asking specific information regarding any quotation or sale to such prospective buyer by any of the other 'subscribers' and the 'bureau,' on receipt of such request, will immediately bulletin all 'subscribers' asking therefor and on receipt of replies will send out a compilation report thereof to all 'subscribers,'

together with the details of sale, if such a sale has been reported, so that all 'subscribers,' including the original inquirer, will have a complete report of this transaction.

"On receipt of a request for such specific information from the 'bureau,' the undersigned 'subscriber' will immediately reply to same giving full information as to any quotation or sale which it may have made to such a buyer and, if it has made none, so report.

"GENERAL MARKET INFORMATION —The 'bureau' will send to its 'subscribers' in the form of market letters 'news clippings' of interest to the industry which may be gathered by the 'bureau' or which may be submitted by the 'subscribers' as being of interest to the industry; providing, however, that all such information to be so distributed is in accordance with the object and terms of this agreement." (R. 175, par. 309; R. 177, par. 312).

At its inception, the Bureau issued to each subscriber a letter of instruction (R. 334) entitled "Important Points of the Service to be Uppermost in Your Mind," in which the Bureau instructed its clients as follows:

"1. Never advise the bureau what you intend to do, as the bureau can clear information only on action that has already taken place. To make this point clear, do not send to the bureau a statement such as 'We en-

close herewith price lists which will become effective next week.' When you file information with the bureau covering any of your quotations to your trade, such information can only be filed immediately after such action has taken place and the form for reporting such information is, 'We hand you herewith prices which we have today quoted our trade.'

"3. Remember also that there are no restrictions implied, understood, or agreed upon by which you are bound at any time to quote any prices other than those which your judgment prompts you to make. The bureau's service will keep you advised at all times of the prices quoted or the prevailing market, and it is up to you to undersell or oversell these prices according to your best judgment, but under the terms of the contract you must keep the bureau advised of any deviations from your last-reported quotation." (R. 334-335).

No claim is made by the Government that any of the provisions of the service contract were at any time or in any manner violated by the subscribers thereto, or that any of the instructions given at the inception of the service, as above set forth, were not strictly adhered to, except as the Government attempts to argue that the exchange of market information as provided for in the contract was for the purpose and had the effect of artificially affecting prices.

The Government in its brief has italicized portions of the service contract which we assume is for the purpose of calling the court's attention to clauses which the Government considers pertinent to its contentions that a combination and conspiracy existed between the defendants. Nowhere in the Government's brief, however, is there any statement purporting to show or to point out wherein the portions emphasized by the Government did have or could have any part in an unlawful combination or conspiracy as alleged in the complaint. We assert that the contract speaks for itself, that it was conceived and carried out in furtherance of a lawful purpose, to wit: that the clients of the Bureau would be afforded so far as the service of the Bureau could attain it, complete, accurate and immediate information as to past transactions, to the end that not only those clients but the ultimate consumer would be assured of keen, fair, intelligent competition and honest dealings at all times. Being convinced the court will carefully scrutinize and analyze the entire record in this case, we feel sure that the service contract and the activities of the Bureau's clients thereunder need no further defense against vague implications.

PROCEEDINGS IN THE LOWER COURT.

All of the oral testimany offered on the part of the Government consisted of the testimony of Will-

iam Hoch, F. J. Hurtz, Sol M. Sulsberger, and M. A. Richardson, all buyers of linseed oil doing business in the City of Chicago. The Government sought to prove by these witnesses that during the operation of the Bureau there was a uniformity in prices of linseed oil sold by the defendant manufacturers in Chicago. All of these witnesses were small buyers except Hoch, who purchased oil for Sears-Roebuck & Company. The record shows, as indicated elsewhere in this brief, that there was the keenest kind of competition for the business of Sears-Roebuck & Company.

The Government also called to the stand James T. Terry, (R. 50), Special Agent of the Bureau of Investigation of the Department of Justice, who testified that he made an investigation of the records of the Armstrong Bureau and checked certain tables which the Bureau prepared and that he verified the accuracy of these tables from the records of the Bureau. All the tables and charts introduced by the Government relative to the activities of the Bureau were prepared by the Bureau and admitted by the Government to be accurate and correct. After the introduction of some further documentary evidence the Government rested its case. (R. 51-52).

For the defendants, Armstrong and Ferry testified fully relative to the operations of the Bureau and its relations to the Linseed Oil Council and

its members. A representative of each of the manufacturing defendants testified relative to the activities of his concern in connection with the Bureau and the other manufacturers and of the trade conditions which obtained in the linseed oil and flaxseed markets. Five large buyers of linseed oil testified that during the operations of the Bureau competition was as open and keen as it was before or after the operations of the Bureau. The defendants offered to present as witnesses five more buyers of linseed oil and the Government admitted in the record that if called to the stand these witnesses would testify to a state of facts substantially as testified to by the five buyer witnesses who were called. (R. 123).

W. J. Tompkins, a traffic expert, testified relative to freight zones (R. 130) and Raymond Montgomery, who was connected with the Bureau, explained certain charts and tables which became defendants' exhibits, and the defendants rested. A large part of the oral testimony is later referred to in this brief, but the court is earnestly requested to read it all from the record. It will be ascertained therefrom that each of the defendant witnesses submitted himself to a searching and full examination on the subjects under inquiry, an examination in which the trial judge took a most keen and vigorous part. No objections were

interposed to any questions by either side. A full and complete picture of the industry and its relations with the Bureau were presented by this oral testimony.

We submit with confidence that a fair-minded person reading the whole testimony in the case will be convinced of the innocence of purpose and action of the defendants and the legitimacy of the results secured; that there was no agreement, either expressed or implied, to artificially affect prices, nor was there any combination or conspiracy in violation of the Sherman Law sought or secured.

It is difficult to comment on what the record shows was not done, but the Trial Judge summarized his conclusions in this respect by the following paragraph from his opinion: (R. 42)

> "Production was not limited during the period the Bureau was in operation. There was no proof of the division of territory. There was no proof that the prices asked by the individual defendants were not fixed by them upon their own judgment, considering all factors affecting supply and demand. There was no proof shown that any member was under the slightest obligation or constraint to ask higher prices or maintain prices."

The foregoing finding of the trial judge is sufficiently full and complete to predicate thereon the conclusion of law that there was no violation of the Sherman Antitrust Act. If he had found nothing further than the foregoing, the defendants would have been fully entitled to dismissal of the bill of complaint.

THE BRIEFS.

However, upon this appeal, the Government says in its brief:

> "As the Government asserts that it relies upon the contracts between the Bureau and its subscribers and upon circumstantial evidence to show the purposes of the plan and the necessary result of its operation, *a full statement and copious quotations from the evidence are deemed advisable, as it will thus be presented in an orderly way and not in fragments,* as would be the case if merely cited or a general statement made of its substance and the record had to be searched to ascertain its exact character." (Government's Brief, p. 4.) (Italics ours.)

The Government then presents in its brief the contract between the crushers and the Bureau without comment, and proceeds through some 130 pages to comment upon the evidence in an effort to show by what it admits to be circumstantial evidence that the defendants were engaged in a combination and conspiracy.

At the outset we vigorously assert that notwithstanding the professions of the Government as to the methods by which it presents and discusses the evidence in an effort to show by circumstantial evidence that the defendants were engaged in a combination and conspiracy, the comments of the Government on the evidence as disclosed by its brief are replete with what appear to us to be persistent misrepresentations of fact, misquotations of evidence, partial quotations of documents and statements of witnesses, when full and fair quotations would make them innocuous or beneficial evidence for the defendants; unwarranted inferences, unfair deductions, groundless suspicions and cynical characterizations. By reason of this method of attack by the plaintiff, our brief is much longer than would otherwise be necessary since these circumstances have compelled us to search the record carefully for the citations of fact with which to meet and challenge the detailed attack upon the defendants thus formulated by the Government.

We therefore take up each separate attack of the Government in the order in which it is made.

RELATIVE AMOUNT OF TOTAL BUSINESS DONE BY DEFENDANTS.

It is alleged in the original bill that the defendant manufacturers are nearly all of the most important producers of linseed oil in the United States, and the Government in its brief at pages

21 and 22 states that the allegation is true as shown by testimony of Mairs of the Archer-Daniels Company and by Quine of the American Company.

Mairs testified that the crushers located at Minneapolis are the American, the Northern, the Minnesota, Spencer-Kellogg, Midland, and themselves —six mills. (R79.)

Quine testified:

> "Q. And there are other crushers in New York City besides the American Linseed Company?
>
> "A. * * * Midland Linseed Products, Spencer-Kellogg Company and the National Lead Company." (R121.)

Spencer-Kellogg and Midland Companies were at one time subscribers to the Bureau's service but were not made defendants in this suit.

Government Exhibit 9 (R269) shows that during the operation of the Council under the Bureau all subscribers sold 17,521,930 gallons of spot oil and that of this amount Spencer-Kellogg and Midland sold 7,420,358 gallons or 42.3%. During the same period all subscribers sold 61,531,879 gallons of future oil, and that of this amount, Spencer-Kellogg and Midland sold 32,590,451 gallons or 53%.

During the same period all subscribers sold 1,988,132 gallons of oil designated as "undetermined," that is, the record does not show whether

spot or future, and of this amount Spencer-Kellogg and Midland sold 663,344 gallons or 33.4%. The figures show that on the whole Spencer-Kellogg and Midland sold half (50.2%) of all oil sold by the subscribers while members of the Armstrong Bureau, clearly disproving, we contend, the allegation of the Government that the defendants are nearly all of the most important producers of linseed oil.

The inability of the defendant subscribers through the Armstrong Bureau's service to artificially enhance, fix or retard the lowering of prices, had such been their purpose, with the two largest and most dominant factors in the industry not taking any part therein, is referred to later in this brief.

ZONING.

The Government in its brief (pages 23 to 35) lays great stress on the matter of zones used by the defendant crushers, and endeavors to portray the use of such zones as a plan or scheme by which the crushers were enabled to fix prices and control production. Counsel for the Government begins his argument on the question of zones by stating that "it is alleged in the bill that the defendants agreed that the United States should be divided into eight zones, * * * and that these zones and prices for the several zones were adopted in

order that the general plan to control production and prices might be more conveniently and successfully carried out (R. 4)."

The only reference to zones in the bill is contained in Article V, paragraphs 6 and 7 (R4), but there is no allegation in said paragraphs or anywhere else in the bill "that these zones and prices for the several zones were adopted in order that the general plan to control production and prics might be more conveniently and successfully carried out." As a matter of fact there is not a semblance of evidence anywhere in the record that there ever was an attempt made by these defendants to control or limit production.

The adoption of these zones was discussed at the first meeting of the Linseed Oil Council held September 17, 1918, and the minutes of this meeting show that the zoning plan was proposed for the purpose of intelligently exchanging market information. At this meeting no mention was made of freight rates or freight differentials. These minutes provided that if any member of the Council "is not active in any zone" he shall so state; that "it was the sense of the meeting that these zones would have to be changed." (R. 667).

Forgetting for the moment that these zones later also indicated freight differentials, let us see if dividing the country into zones merely for the purpose of quickly identifying territorial quotations

and sales could result in unlawful restraint of trade, and if as a matter of record, did actually restrain trade in interstate commerce. Let us assume that each defendant crusher operated in every zone. On a certain day reports come to the Bureau from Subscriber "A" that he had lowered his price and had sold a great many barrels of linseed oil in Zone 2. This information is immediately relayed to all the other subscribers. Does not this information at once inform the other subscribers that the volume of business in Zone 2 is increasing? Does not such information also have the effect of immediately putting the sales forces of these other subscribers to work in that zone to secure a share of that business? Suppose upon receipt of this information some of the other subscribers start after business in that particular zone but cannot get any because their prices are not as attractive as Subscriber "A" is quoting. As business men, are they going to leave that zone with its attractive promise of sales and seek business elsewhere, or, are they going to make their prices low enough to secure business offered in that zone? No answer seems necessary. Suppose, however, Subscriber "A" has raised his price on linseed oil in this zone and the other subscribers receiving information from the Bureau that this particular zone is showing sales, seek business in that zone at prices which are lower than

Subscriber "A" (and the record shows that varying prices were quoted by these subscribers much more often than not), is the business in that zone going to Subscriber "A," who is quoting higher prices, or to the subscribers who are quoting lower prices? This also calls for no answer. It is asserted, therefore, that dividing the country into zones was primarily for the purpose, and had the result, of intelligently reporting territorial quotations and sales in the respective zones; that the zoning was intended to, and did result, in promoting keen competition between the various subscribers in these zones at all times. Later, at the meeting of October 14, 1918, the effect of the various freight differentials on shipments to the Pacific Coast was taken up (R669-670). No discussion was had at this meeting as to freight differentials in the other zones.

At the meeting of November 13, 1918, we find the initial recommendation of differentials representing freight costs for the various zones. The court is respectfully requested to minutely examine the minutes of this meeting as regards the adoption of the freight differentials in these zones. That these differentials were adopted only after careful analysis of actual transportation costs and in fairness to the buyer of linseed oil is shown from the following (R671):

"The matter of revisions in the freight zone map was then taken up as it was evident that changes were in order because of some portions in these zones being greatly affected by water rates.

"Suggestions for such revisions, as made by two of the subscribers were set forth by colored lines upon a large map and it was clearly shown that the Southern Atlantic and Gulf Port States, favored by water rates from New York, required additional zoning and Spencer Kellog's proposed zone four covering this territory was a logical addition.

"It was further shown that the cities of Richmond and Norfolk, Va., by reason of their nearness to the line of zone three, were logically entitled to a better freight allowance than the other markets located with them in zone four.

"To cover this situation it was the sense of the meeting that the cities of Richmond and Norfolk were entitled to one per cent per gallon differential over *the respective prices* for zone three."

(EXCERPTS FROM MINUTES OF MEETING, DECEMBER 16, 1918.)

"23. The acceptance of the freight zones recommended was then taken up.

"24. Mr. Quine advocated a return to the old custom of basing the subscribers' price lists on Minneapolis, suggesting that the services of a competent traffic man be secured to classify

freight rates for the information of manufacturers and, in a way which would cover the various distribution or warehouse points on even figures only, such rates being expressed as so much per gallon over Minneapolis base prices, all of this to be published as a freight traffic book for the use of the Council members.

"25. Mr. Quine's suggestion developed a general discussion of the whole matter, Mr. Kellogg reiterating his belief that the freight zone was really the fairest way to handle the whole matter in the case of both buyer and seller and with due regard to simplicity and directness.

"26. In connection with the freight zone matter, specific reference was made to the apparent need for the correction of differentials as applied to Lincoln, Nebraska, and Memphis, Tennessee.

"27. It was the sense of the meeting that Lincoln, Nebraska, should be temporarily regarded as a zone 2 point, carrying a differential of 1c per gallon over zone 1, while in order to equalize the Memphis situation that market should carry a 3c. differential over zone 1.

"28. As the lists of agents filed by the subscribers with the Bureau indicate where substantial stocks are carried, the Bureau was authorized to secure the counsel of a competent traffic man for the survey of the matter and re-

port at the next meeting with a tabulation of freight costs from Minneapolis to the various distributing centers." (R745.)

Market Letter No. 276—Flaxseed Crushing Industry, February 20, 1919.

Inquiry Regarding Subscriber No. 1's Price for Ft. Smith, Ark.

To AMERICAN LINSEED COMPANY:

Will you kindly reply promptly and fully through the bureau to the letter published below?

Buffalo, N. Y., February 19 ,1919.

ARMSTRONG BUREAU OF RELATED INDUSTRIES,
Chicago.

Quotation report No. 28, Subscriber No. 1.

Gentlemen: We note from the price list as now filed by Subscriber No. 1 under date of February 14th, that their price for Fort Smith, Ark., is $1.49¼, notwithstanding that this point is located in zone No. 7 which, according to their own price list, is $1.51 cooperage car lots direct shipment.

The purpose of this letter is to ascertain if there has been any special consideration made covering the point in question.

Yours truly,

(Signed) SPENCER KELLOG AND SONS, INC.
V. H. HUNTER,
General Sales Manager.

Market Letter No. 294—Flaxseed Crushing Industry, February 27, 1919.

Reply to Market Letter No. 276, Inquiry Regarding Subscriber No. 1's Price for Ft. Smith, Ark.

New York, February 24, 1919.

ARMSTRONG BUREAU OF RELATED INDUSTRIES,
Chicago.

Gentlemen: In reply to your market letter No. 276, we have made an exception with respect to Ft. Smith, Ark., just as we have made an exception in the case of Memphis, and Lincoln, Nebraska.

Yours very truly,
AMERICAN LINSEED COMPANY,
(Signed) F. K. QUINE,
Manager Oil Sales Dept.

William O. Goodrich, one of the defendant crushers, testified (R. 96) with respect to zones that the purpose of the zone map as he understood it was to facilitate relaying of information to the Bureau, and that

> "the fact of having these zones was not new at all. It was merely a way to divide up the freight rates so that it was not necessary to go into extensive calculations in figuring the rate of freight to a point in any zone. The basic rate was made at the point where the seed originated, and we figured that a mill at that point was manufacturing at the lowest or

basic price and that the distribution should be in accordance with the cost of freight to get the goods from that point to the various points in the country. The zones included certain areas that had approximately the same freight rates in order to eliminate small differences in various local points in these various zones. There was, of course, a change in that method, occasioned by the fact that the crop was almost a complete failure in the Northwest, and I and others were obliged to buy seed from South America. We reversed the condition and made New York naturally the base. At that time we simply reversed the proposition, making zone 3 the basic point, as that was the cheapest point, and from there on the rates were elevated in accordance with the freight rates to the different parts of the country.

Carpenter, J. Did you manufacture in New York when the seed came from Argentina?

A. No, sir.

Carpenter, J. All of your refining was done in Milwaukee?

A. Yes; I only have the one mill.

Carpenter, J. I was trying to understand why you should have to change your price zone if the seed came from New York and Argentina rather than through Minneapolis from the Northwest.

A. Well, Judge, because if it comes from New York, I am at a very great disadvantage with the New York man. I have paid 35 cents or 40 cents a hundred to get the seed from

New York to Milwaukee, and if I again send the oil back to New York I am at a still greater disadvantage to that man. It really resulted in cutting me out entirely in the eastern market. I was no longer able to compete, but it was quite right that New York should be made the base.

I had to adopt the basis of the New York man's price, but I did not attempt to sell in New York. I was not able to get anywhere near New York, and I have not been able to ever since. The adoption of the zoning system certainly did not in any way fix any price or have a tendency to fix the prices which I might quote anywhere. It only made the prices relative and commensurate with the freight rate to any particular point. Previous to the adoption of the zoning system it was a somewhat laborious undertaking to find out what the actual freight was and figure it to a man's town. The zone figures are somewhat approximate. It did not always follow that it costs exactly 2 cents a barrel to get into zone 2, but it was as nearly as we could approximate it. Our contracts read "f. o. b. point of delivery, freight allowed."

Q. And you do not impose that obligation on any one, do you?

A. No, sir. Not unless—

Q. Each buyer is at liberty to pay his own freight and buy it at the lower price?

A. Yes; that is, if he signs a contract, we won't object.

The attention of the Court is called to the word "price" appearing at the beginning of line 3 on page 29 of the Government's brief for the purpose of showing that Goodrich did not testify "that the price should be in accordance with the cost of freight," but testified "that the distribution should be in accordance with the cost of freight." (R96.) The Court's attention is called to this discrepancy between the Government's brief and the record for the reason that throughout the entire proceedings in the lower court and now in this brief the Government is particularly referring to "the price." That there was never considered by these defendant crushers or the Armstrong Bureau any such thing as "the price" will be more fully set forth in another portion of this brief, particularly as relates to "legal exceptions."

Samuel Mairs of the Archer-Daniels Co. testified as to zones (R78):

> "I don't know that I can explain this zone system, but I will try to. We have mills in Minneapolis and Toledo and in Buffalo. We call Minneapolis our zone one, and make that our base, because we figure that the Minneapolis market is the best for the raw material and that we are manufacturing at our cheapest where we can buy the flaxseed. Those conditions changed at different times. Sometimes the Argentine market became the cheapest,

and then we would change our base to zone three, which is in Buffalo. If we had to move the seed from Duluth to Toledo, there would be a freight change in there, and we figured we couldn't manufacture as cheap in Toledo as we could in Minneapolis. The zone system was established, as I understand, so as to make an easier way of reporting sales to the Armstrong Bureau and so one would get intelligent information from the Bureau. If the freight was higher to a certain point, or if a man wished to pay f. o. b., we would be very glad to sell him f. o. b., no matter what zone he lived in. The differentials adopted were based as near as possible on the freights.

"Q. After the adoption of the zone system, did it make any difference in the matter of your quotations in the different portions of the United States, so far as zones were concerned? Did it make any difference in your quotations as to the prices you charged in the different portions of the United States?

"A. No, sir.

"Q. Why didn't it?

"A. Because we made our basic price in Minneapolis; then we would use that base to add on the difference in the zone prices."

F. C. Smith of Minnesota Linseed Oil Co. testified with respect to zones (R109):

"I think the base price was originally arrived at in Minneapolis on account of the flax, as the supply for the industry at that time

originated in the Northwest. That made Minneapolis the nearest manufacturing point to the actual source of supply, which would naturally make the prices at a distance from that base price higher. Later on we had a failure of the flax crop in the Northwest and the source of supply was from the Argentine, which naturally transferred the base to New York. The change was made, as far as my recollection serves me, merely by filing prices with the Bureau showing the prices in the different zones. The differentials shown in the zone system are based upon the distance and expense of getting the oil into the zones.

"We sell either f. o. b. at the mill or f. o. b. at the buyer's plant. F. o. b. the crusher's plant is most decidedly the more favorable to the crusher, because he is relieved of all responsibility in the matter of transportation. Of course, when we sell f. o. b. the buyer's plant, the freight to there would be in the price. One reason the buyer wishes terms f. o. b. his station is that otherwise the crusher would not be responsible for leakage in transit * * *."

F. K. Quine of the American Linseed Oil Co. testified as to zones (R117):

"Our principal office is in New York, in zone No. 3. The differentials defined by the Armstrong Council are simply a definition of a custom or practice that has existed ever since I knew anything about the linseed oil business.

The adoption of the zones did not make any change in the method of our quoting prices to our trade. The base price, except when the Argentine seed is on a parity or under a parity with Minneapolis, is with Minneapolis, as that is where we usually get our largest supply of raw material. As I recall it, there was no bureau or council action on the question of changing the base from Minneapolis to New York, but it was done by individual action on account of the crop failure in this country and the necessity of getting the supply from Argentina. A purchaser can always buy from us f. o. b. his place or f. o. b. our mill."

* * * * * *

"Q. You could make sales from Buffalo into zone 2, in certain points in zone 2, where the freight rate would be no higher or no different from sales into certain points in zone 3?

"A. Yes, sir.

"Q. Now, then, on those sales you would have to charge, although the freight rate was the same—you would have to charge a higher price on the sale into zone 3 than you would on the sale into zone 2?

"A. Yes.

"Q. Precisely. How is that justified?

"A. Well, that has been a common custom of the trade for twenty-three or twenty-four years since I have been in it.

"We had a much higher differential before the Bureau than that which existed during the Bureau, and there is nothing new in the

map, although we did not have a map before. I personally did not have to draw a map to know what the lines of demarcation were. They were practically the same before as in the zones adopted by the Bureau, although there may be some slight deviations. But, after all, zones do not make any particular difference as to the making of prices. They were, however, generally adhered to and were a custom of the trade. The resolution simply defined a common practice."

* * * * * *

W. J. Tompkins, traffic counsellor, testified (R130):

"I studied the zone map (Government Exhibit 5). It is customary for some organizations throughout the country to sell on a zone basis, as for instance the Steel Valve Manufacturers' Association and the Salt Producers' Association.

"The zoning process generally, as I have understood, is that it simplifies the method of distribution. Take, for instance, a base point which usually is, from a transportation point of view, the determining factor, and making that the base point, and then radiating out from that various territories or zones based on differentials or arbitraries over the base point or base zone.

"Q. And is the railroad rate in every case determined by the distance of the particular destination from the point of origin?

"A. Not by any means.

"Q. What other determining features are there in the making of railroad rates?

"A. The cost of operation, of course, entering first; the service to be performed, the value of that service to the shipper; and the volume of business moving, which is a very large factor, the commission having said in many opinions that the volume of business determines in a very large measure the measure of compensation that the carrier shall receive. The competitive conditions are another very distinct feature.

"Q. Are the competitive conditions an important feature—

"A. Most important.

"Q. In determining rates?

"A. Very important; yes, sir. They have recognized that, if I may state, in the coal cases. They have taken the distribution from the large coal areas of production, and they zoned that into three zones with two or three subzones; they are known generally as the Outer Crescent, the Inner Crescent, and the Ohio fields. They then, also, in addition to that, zoned the points of destination, and have determined the rates entirely apart from the mileage, but according entirely to the competitive conditions existing, the ability of the railroads to move the freights, and the general flow of traffic. There are other cases that I may say I could mention. The entire rate fabric of the country between the Atlantic

and the Pacific Oceans is zoned and approved by the Interstate Commerce Commission, in the matter of the transcontinental business, both east and westbound. The percentage, the rates, both in class and commodity rates, are zoned and approved by the Interstate Commerce Commission in the movement of all business both east and westbound from the Atlantic coast to Chicago and to the Mississippi River."

* * * * * *

"Assuming that Minneapolis and St. Paul are base points for production of linseed oil, and having reference to freight rates, and to selling costs in the various zones outlined, the zoning shown on the freight zone map, Government Exhibit 5, in my opinion, does not work an unfair discrimination against buyers in any of those zones. As a matter of fact, taking all the factors from a transportation point of view, into consideration, whoever devised that plan, I think, was very careful in devising it, and it seemed from a transportation point of view to very accurately represent the conditions.

"The Court. Q. You mean that if a zoning system must be used at all, that this does not show any more than the organic distribution?

"A. Yes.

"The Court. Q. So that when you have zones, and approach the border, there are bound to be discriminations?

"A. Yes. That has been worked out, by the Interstate Commerce Commission; they have recognized that principle many, many times, but say for the general good it operates to the advantage, to have the grouping system."

John Mann of Buffalo testified (R70):

* * * * * *

"We always had a zone system in our business. We are bound to have it, because the farther you get away from the plant to sell the goods the higher is the cost to get them to the buyer, and consequently there must be an increase in price to cover that. That has always been our policy. The adoption of the zone system practically would not change our policy in reference to quoting prices. We quoted a base price at the mill, and we would sell at that price anywhere in a certain territory within a certain mileage from the mill. We practically pay, or we allow, transportation charges on our sales. For instance, say I was quoting oil to a man today at 56 cents a gallon. From this we would allow a deduction of four cents a gallon toward payment of freight. It really means that we do pay it or allow it. Supposing the price of oil today at Buffalo to be 60 cents, if we were to sell that oil, say, in Nashville, Tennessee, the price would have to be much higher than that to cover the cost to get it there, or otherwise we would not touch the business."

Market Letter No. 201—Flaxseed Crushing Industry—January 27, 1919.

Excerpts from minutes of meeting, January 23d, 1919 (R381):

"21. As the Bureau had been commissioned at the last meeting to obtain figures showing the freight costs on oil per gallon from Minneapolis as a basis the different distributing centers where oil was carried in warehouse by various council members Mr. Armstrong, for the Bureau, distributed a sheet of such tabulations as prepared by the Lent Traffic Service of Pittsburgh, the rates listed thereon being given in cents per ton for meal, cents per 100 pounds, and cents per gallon for oil in tank cars, together with cents per gallon for oil in barrels.

* * * * * *

"25. In order to secure definite analysis of such price lists the roll was called on the question as to whether or no the various price lists of the council members now on file with the Bureau and covering the present freight zone system could be stated to represent delivered prices on full carloads only until such council members should advise to the contrary through the Bureau. The answer to this question was unanimously in the affirmative.

* * * * * *

"26. NOTE.—The council members are advised by the Bureau that while their answer to the above question is to be accepted as a sys-

tem of their present basis of making their respective quotations and clearing same through the Bureau, there are no restrictions whatsoever in making any changes that they may see fit to make in such policy excepting, of course, that they shall at once advise the Bureau fully and completely when such changes have been made."

Market Letter No. 370—Flaxseed Crushing Industry—March 28, 1919.

(Excerpts from minutes of meeting, March 26th, 1919.) (R439.)

"31. The subject of the new system of merchandising as carried over from the last meeting was then taken up, and the secretary read a brief report from the Bureau on this matter covering the cost of the freight rate hand book.

"32. When this question was first discussed the Bureau's inquiries for service covered a considerable field and selection was finally made of the Lent Traffic Co. of Pittsburgh, Pa., as being particularly well equipped to give the required information with the utmost promptitude and in a reliable manner.

"33. This company has been rendering traffic service to large industrial interests for twenty-five years, are regularly in touch with all sources of information, do a large business in freight auditing, and conduct cases before the various traffic commissions.

"34. The proposition they have submitted would be to prepare freight sheets covering linseed meal and cake and linseed oil from three points of origin—New York, Buffalo, and Minneapolis—to 20 distributing points to be selected by the council, and the supply of sufficient sheets for each subscriber. These sheets would give the carload freight for oil, cake, and meal per short ton (2,000 lbs.), the carload freight of oil in tank cars per 100 lbs. and per gallon to each distributing point based on a weight of 7½ lbs. per gallon, and the same information on oil in cooperage based upon a weight of 9 lbs. per gallon. Freight sheets would be daily checked for changes to any one of the distributing points, and new sheets issued immediately any change was advised and for every change made.

"35. The supply of freight sheets would be sent to the Bureau and be distributed through our daily distribution of market matter. The cost for such service, including the Bureau's supervision, would be $750.00 per year. This amount divided equally among the council would give them freight sheet service at a cost of approximately $58.00 each per year.

"36. Should it be decided to increase the number of distributing centers to 30, the cost would be $850.00 per year, or $65.60 annually for each subscriber, and further additions could be made at any time at an additional cost of $100.00 per year for each ten additional distributing points.

"37. There was then a discussion of this plan versus the present zone system and it was evident from that discussion that the council was somewhat divided on the two plans.

"38. Mr. Matthews offered a proposal from the Spencer Kellog Company covered by the following resolution:

"39. RESOLVED, That it is the sense of the meeting that the subscribers continue to file their price lists on the zone system as now in force, but that in cases where less than carload shipments are made from mill or distributing points that one cent be added to the zone warehouse prices in lieu of freight, and the actual freight prepaid. The following points to comprise mill and distributing centers:

(List.)

"40. This resolution and the operation of Mr. Matthews' proposed plan was generally discussed, but upon analysis of the expressions from various council members it was evident that this resolution could not be unanimously approved at this meeting, and therefore the resolution was not allowed to go to vote by the chair."

MEETINGS.

The Government devotes very little of its brief to the meetings of the Linseed Oil Council, but leaves a great deal to be inferred from a few cryptic statements as to binding agreements and

"round table discussions." That the Court may have before it a comprehensive resume of what was and what was not done at these meetings, the following is submitted from the record:

Mr. Ferry testifying as to the meetings (R86):

> "After the taking of the attendance is what we call the 'round table,' or what has been referred to as the 'roll call.' That is in a sense a means of clearing away any possible little misunderstandings that have held over from the written exchange of market information. For instance, one manufacturer might wonder why another manufacturer had done a certain thing for his own good reasons. He very often states why he wants to know, although in some cases he does not. The first man in alphabetical order is, as we say, 'put on the carpet,' which is a term which means comparatively little. Then we go around and call the roll of the others, and each one has the privilege of asking such questions as he desires of the other. Those questions are sometimes such as 'What are you paying for a certain kind of labor?' 'What quotations are you getting on barrels?' 'In your experience, what has been the best way to filter linseed oil?' I could go on almost without end on the sort of questions that are asked. The man answering the question, of course, has the right, if he considers it too leading, or if it infringes on his business privacy, to refuse to answer, and

as a matter of fact such questions are seldom asked. The whole tone of the proposition is just simply a clearing of any possible atmosphere. There have been many cases when we have gone through that roll call and there has not been a single question asked. Yet, there are other times when it brings forth the most constructive information. Such information, for instance, may relate to handling labor, of the question of whether it is better to use steel barrels or wooden barrels, the question of how best to filter linseed oil, the manufacturing process, and everything under the sun. There is absolutely no bitterness or animosity at any of these meetings. Occasionally at these 'round tables' one may may ask another man about the past price in some transaction which he does not understand, or there may be some detail of it that he wants cleared up, but which he has not thought was important enough to write a special letter about and concerning which he has just said to himself, 'I will wait and ask the other men at the meeting.' There has never been a discussion as to what prices were to be charged by any of the crushers.

"Q. If any such discussion were attempted, what would occur, if anything?

"A. If such a discussion seems imminent, which it has at times, the Bureau promptly cuts it short or rather cuts it out altogether. That is the function of the director.

"There absolutely were not at any of the meetings that I ever attended any agreements

or understandings, expressed or implied or otherwise, in reference to prices which any subscriber to the Bureau might make."

Mr. Armstrong testified as to the meetings (R136):

"The meetings of the Linseed Oil Council convened at 10.30, adjourned for luncheon at 12 o'clock convened again at 1 o'clock and adjourned at 4:30 or 5 o'clock. There were some shorter sessions. In anticipation of approaching meetings we sent out what we called a docket in order to systematize the meetings. These dockets were sent out two weeks in advance and contained the important questions for discussion, so that each subscriber necessarily had to be prepared and discussed the matters intelligently. That, however, did not prevent the discussion of any other questions that might come up, but as a general rule the dockets are reflected in the minutes of the meetings.

"The questions of prices to be charged and matters of that kind were never discussed at the meetings. There were twenty meetings in all of the Linseed Oil Council. The docket is made up of matters suggested by the crushers for general discussion and of matters laid over from previous meetings for further research. In any of this work where we find a group in a more or less chaotic condition with regard to merchandise practices we do not get

at the finer or more constructive features of our work for some time. I think in this industry where the service started in October, those broader features of service did not enter into our discussions until some time in February. Beginning with the institution of the service the work with the War Industries Board was of very direct interest to us and was a part of our cooperation. We immediately started the matter of flax development, but Mr. Nolan's bureau, under his direction, was doing practically everything that could be done in that respect. Then there was a discussion of a uniform loading plan which was worked out with the Master Car Builders' Association. Our Committee worked out a plan with that association and the plan was adopted. The matter was very scientifically gone into, and some blue prints were finally decided upon, were distributed through the Bureau service and were adopted by the manufacturers.

"We also had work on our tariff committee, which, however, was not very active at the outset, because the tariff question was not then active. Then there was the standardization committee, of which Mr. Hirst was chairman, in which we endeavored to work out a standard definition whereby the purity of linseed oil would be established. The committee also worked for recognition from the American Society of Testing Materials. We wanted

to work out this standardization so that the public would be afforded a rule by which they could know whether or not they were getting pure linseed oil. There are in fact impurities in linseed oil and there are impure substitutes. 'Foots' in linseed oil means the precipitation or sediment that comes from different grades of flaxseed. I believe that there is a larger precipitation in linseed oil crushed from the Argentine seed than there is in that crushed from domestic seed. Immediately after the armistice a great deal of foreign oil came into this country and we were receiving complaints from the trade as to this abnormal amount of precipitation. Our research work naturally was to show that the American manufacturers were producing a higher grade of oil. In that connection we instituted some tests by committee work to ascertain whether filtration of oil through filter paper instead of filter cloths would produce an oil of better clarity. We found that filter paper was better in some instances, and that information was given to the council for what it was worth. We then instituted a rather extensive test that was conducted by two of our members in their own plants to see whether or not linseed oil could be clarified by centrifugal force. I believe the result of that was that it was not as desirable as the filtration through the regular presses.

"All of those subjects were a part of our work at our meetings. I also have here a notation of the work undertaken by the council through the Bureau and by the council members themselves to bring about a different merchandising practice in the sale of linseed oil. This oil is sold on a gallon measure basis, instead of a pound basis, as all other oils are sold. There has always been a great deal of controversy, and I believe several law suits, as to the actual weight of a gallon of linseed oil. It has been the practice in this industry to take 7½ pounds for a gallon, although as a matter of fact I believe that figure is erroneous and that it should be a little more. We, therefore, in the interest of the consumer, circularized the trade to see whether or not the trade would approve a change in the basis of measuring oil from the gallon measure to the pound. The trade was circularized at considerable expense by the Bureau, but mostly by the crushers, in accordance with a plan agreed upon by them through the Bureau. We found that the larger consumers were in favor of the pound basis, but the little consumers averse to a change, and we did not institute the change. It should be done, and I hope some day that it will be done.

"Another subject is the usual discussion of costs, which pertains to all our groups. In the linseed industry the most important factor in the discussion of costs was the bringing about

of the recognition of an accurate figure to represent the cost of the containers. In my linseed oil buying experience I wanted at all times to know that the differential between oil in containers and tank wagons represented actually the cost of the package. So in this industry we exchanged costs on container and in that way recommended the adopted costs. The linseed oil industry uses what is known as second-hand barrels, and we gather the cost of them throughout the country. There is more or less leakage from second-hand barrels and wooden barrels and we took up the question of substituting steel barrels. We found that it was not practical for all the manufacturers unless they were of considerable size to handle and invest in the steel barrels so as to substitute them for wooden barrels, but the council was in hopes that it would come about.

"In the matter of publicity we saw a great opportunity for a joint advertising campaign to develop a wider use of meal by stock growers. It is largely consumed in foreign countries for stock feeding, and we decided and recommended that if the farmers and stock growers in this country could be brought to a clear understanding of the food value of this meal that we would increase the market for it and have it consumed in this country instead of abroad. We discussed a plan for the joint marketing of the meal."

In the second paragraph of page 36 of the Government's brief statement is made "that each subscriber could be subjected to a searching cross-examination concerning any transaction had by him or any practice incident to the manufacture or sale of oil." Ferry's quoted testimony shows that the very opposite was the case. He testified (R86):

> "The man answering the question, of course, has the right, if he considers it too leading, or if it infringes on his business privacy, to refuse to answer, and as a matter of fact, such questions are seldom asked."

Further, an examination of the whole record in this case does not disclose a single instance where "a subscriber was subjected to a searching cross-examination of any kind."

On pages 38 and 39 of the Government brief two excerpts from the minutes of the council meetings are set out dealing with the "round table" feature, and then follows the statement by the Government, "no comment is necessary to show how effective must have been the friendly companionships prevalent at these meetings as described by Mr. Ferry." Does a statement like this throw any light on the case at bar? Is there anything in these excerpts that suggests a conspiracy to restrain trade or fix prices? Does this insinuation, born of suspicion

in the mind of Government counsel, strengthen that other Government innuendo that these men were searchingly cross-examined and reproved for their acts?

We quote below what the minutes of two other meetings disclosed as to these "round table" discussions.

Market Letter No. 1330 (March 10, 1920) (R416):

> 6. The roll-call feature under this order of business was instituted and partially gone through with, but as it was evident to the meeting that no one had any specific questions to ask of any other council member regarding past and closed transactions, the question was asked as to whether this roll call was necessary at this meeting with the answer in the negative.

Market Letter No. 1366 (April 13, 1920) (R416):

> 6. Upon question from the secretary as to whether or not the roll call under this order of business should be gone through with, it was the sense of the meeting that this order could be dispensed with. The Secretary then advised that any matters of general interest, not docketed, which would fit in under this order of business might be brought up by the council members.

If these "round table" discussions were used as part of a plan to unlawfully restrain trade does it seem plausible that this order of business would be dispensed with at these meetings? Every one of the defendants was subjected to cross-examination by counsel for the Government in the lower court, and nothing appears in the record to show that these "round table" discussions tended in any way to restrain trade or commerce or fix prices. Now, however, the attorney for the Government by a shrug of the shoulder or a wink of the eye attempts to make this Court believe that because these subscribers came to discuss business matters under the term "round table," there was something suspicious about these discussions. In other words, simply because the Government's counsel thinks something unlawful might have been done at these "round table" discussions, he asks that it be taken for granted so far as this Court is concerned. As we continue in this brief we shall set forth more and more clearly that the attitude of the Government from the beginning to the present time has been predicated on allegations based on suspicion but not supported by fact. The Government had in its possession *all* of the minutes of the Armstrong Bureau, and they now put before the Court with reference to "round table" discussions two paragraphs which show absolutely nothing that could be construed as part of a plan to do

anything except ask questions of each other which were or were not answered as the party questioned wished. The record will show that each defendant submitted himself to the Government's counsel for cross-examination as to what took place at these meetings, and we submit that the Government's brief itself on the subject of what took place at these meetings is an admission that the "round table" discussions were not part of a plan to fix prices, enhance prices or retard the lowering of prices.

We feel that this Court will not judge this case on innuendoes or suppositious statements made by counsel for the Government. What was done at these meetings is disclosed in the record and is fully set forth in the testimony of Armstrong and Ferry quoted above. If there is anything unlawful set out in the testimony of these two witnesses the Government has failed to mention it in its brief except by way of innuendoes and suppositious statements.

On October 19, 1918, the Bureau sent a letter to the Linseed Oil Crushers calling their attention to the innumerable sudden and seemingly unwarranted price revisions by several subscribers. The communication and replies thereto are quoted by the Government in its brief (pages 39-45).

An examination of Government Exhibit 3 (R. 184) shows that on October 1, Spencer Kellogg

was quoting $1.79 per gallon for oil, and Midland was quoting the same. On October 7, Kellogg dropped to $1.74 and the next day Midland followed. On October 10, Kellogg and Midland dropped to $1.64, and the next day each dropped to $1.59. October 16, Kellogg dropped to $1.53 and the next day Midland dropped to $1.51. On October 18, each was quoting $1.48. It further appears from this exhibit that the quotations of the other subscribers on these particular dates were not at all comparable with the prices quoted by Kellogg and Midland.

It appears from the quoted replies to Armstrong's letter of October 19, that there was considerable difference of opinion as to whether or not these falling prices were justified. Armstrong in his letter stated they were unwarranted and unfair to buyers, and believing this he considered it his duty as head of the Bureau to write each subscriber to get his opinion as to the true situation. In this letter he pointed out that many buyers who had bought at higher prices were penalized and the reply of the American Linseed Oil Company agrees with him on this point. That Armstrong did not write this letter for the purpose, nor did it have the effect of preventing the subscribers from quoting any price they desired, or that the subscribers understood that Armstrong could in

any way compel said subscribers to stop quoting lower prices, is shown from the following excerpts from Armstrong's letter and the replies thereto.

Armstrong's letter in part said (R. 341):

> "The Bureau's service does not presume to direct any of the subscribers in so far as prices which they feel called upon to quote." * * *

The American Linseed Company's reply in part said (R. 344):

> "We believe that prices which have been quoted have not been justified for the reason that the oil on hand at the present time has probably cost more than it is being offered for at the present time. If there was to have been a considerable decline, and I am inclined to think that there should have been some decline, it should only have been put into effect on oil to be delivered during December forward. October and November oil, as pointed out above, has cost more than present market prices." * * *
>
> "It is our opinion that the reduction has much more upset the buyers and made them more dissatisfied than any action which has been taken in a long while, for it must be borne in mind that our customers in turn have contracted for their supply at a higher price, and they are having to reduce their prices because of the manufacture to such an extent as to probably eliminate profits."

Midland's letter in part said (R. 344):

> "We believe that market conditions during the past three weeks have justified a considerable decline in the linseed oil market, but we believe that this decline has at times been unduly rapid." * * *
>
> "We cannot refrain from calling your attention to the record of the last three weeks as shown by your market reports. You will find that during the three weeks just past the linseed oil market has declined 31c per gallon. You will find that this company has done nothing more than meet prices which have been initiated by competitors with the single exception of one decline in the market amounting to 2c per gallon."

Spencer Kellogg's letter in part said (R. 345):

> "Answering your letter of the 19th we do not feel that there is anything hysterical in regard to the conditions of the linseed oil market. There are legitimate reasons for a decline in price to the present value, and we, for our part, have not planned our declines in price to take advantage of any particular order which we might have secured at that instant."

It is apparent from the above that Kellogg and Midland were engaged in a price controversy during this period. It is also fair to assume that if the October and November oil cost more than the prices quoted, competitors of these two companies

were being unduly penalized by reason of this dispute. It was an unfair, uneconomic situation which Armstrong honestly believed should be called to the attention of the subscribers, not for the purpose of bringing about concerted action on the part of these subscribers to stop lowering prices, but to put before them the true situation and then let their own judgment govern each subscriber's future action.

The Government intimates in its brief that Armstrong's letter stopped the decline, for it says on page 45, "that some influence had well stabilized the market by December 1st, as there was no change of quotations during the month, but three in January, one in February and two in March."

The record shows that when Armstrong wrote the letter on October 19, the high for oil was $1.63 and the low $1.48. By January 15, 1919, the high had declined to $1.49 and the low to $1.43 (R184). This table also shows that on other occasions the prices took a sharp decline, as on October 1, 1919, the price in one day declined from $2.10 to $1.84 and on October 6, there was a further decline to $1.70 per gallon (R187). These figures would seem to clearly indicate that Armstrong's letter of October 19, 1918, did not have the effect of preventing the subscribers from lowering their prices whenever they so desired.

That the Bureau, however, did not confine itself to commenting to the subscribers on a falling market is shown by its letter of July 8, 1919, bulletined to each subscriber wherein it requested expressions from the members as to whether or not conditions in the oil market had not reached "a time when selling at cost might represent not only a needed service to the public but a desirable service to the industry as a whole." This letter was issued at a time when an open and nation wide campaign was launched to reduce market prices on all commodities.

The letter is quoted below in full:

MARKET LETTER No. 587.—Flaxseed Crushing Industry—July 8, 1919 (R. 448).

A TIME WHEN SELLING AT COST MIGHT REPRESENT NOT ONLY A NEEDED SERVICE TO THE PUBLIC BUT A DESIRABLE SERVICE TO THE INDUSTRY AS WELL.

"From our observation of the soaring prices for linseed oil, which naturally have followed the 'sky-line flight' of the flaxseed market, the Bureau is disposed to argue for a merchandising policy on linseed oil, at least for a period of time, where the flaxseed cost at its present high level, shall be more or less disregarded, and the selfish interests of the industry, as well as its duty to the buyers of its products, shall be more pertinently considered.

"With the present market price for linseed oil well around the $2.10 per gallon price,

granting that such a market is quite in line with the present abnormal price for flaxseed (probably the highest ever known in both cases), we are confronted with the question as to whether or not the buyers of linseed oil can actually 'afford' this abnormally high market.

"The paint manufacturer cannot always anticipate his requirements for linseed oil, and it is unquestionably true that with the tremendous abnormal demand for paint, which is the result of the nonpurchasing period of this commodity during the war, the paint industry is now crowded to the utmost to fill this demand, and probably even the most long-headed manufacturer did not anticipate this demand in his contracts for linseed oil.

"Paint, like many other commodities, has been forced to an abnormally high-priced market, and further advances on the part of the paint manufacturer to cover this increased cost of linseed oil could hardly be made in justice to his trade. Therefore the linseed oil industry is squarely confronted with the question whether they should not make some personal sacrifices to assist in carrying the burden of the paint men, who represent some of their most substantial customers.

"Again, everyone in the linseed oil industry has recognized the desirability of working toward the elimination of the speculative feature of the flaxseed market from the manufacture and sale of linseed oil, and as it is quite probable that the present abnormally

high market for flaxseed is somewhat due to speculation on the part of the crushers, are we not squarely up against a concrete example of the burden which is placed upon the industry through such speculation, and is it not time that we do everything within our power—making substantial sacrifices, if necessary—to relieve the prevailing prices of linseed oil from the results of this speculation?

"Viewing the situation from an absolutely selfish standpoint, we are confronted with the fact that soya bean oil, which is admitted by some to qualify as a substitute for linseed oil, is selling today at approximately $1.30 per gallon, and the difference between this price and that of the prevailing linseed oil price is a rather substantial argument for the use of the former, and converts made under these conditions may be considered as pretty thoroughly converted.

"As we have set forth in the heading of this market letter, the time is unquestionably at hand when this matter should be worked out by each one taking an unselfish point of view and shaping his action so that he may deliver a service even to the extent of sacrificing profits and the Bureau considers it a duty to you to thus publish our deductions.

"Will you kindly give this question the earnest consideration it deserves, and assist to the desired end by your active participation and support?"

The replies from the various subscribers are quoted below for the further purpose of showing the Court that each had his own particular idea as to why his costs justified the prices he had quoted the trade for oil and also to show that the various subscribers had differing views as to the cause of such high prices:

Archer-Daniels replies as follows (R. 750):

> "We note all you say about the most unusual prices for linseed oil, with the inquiry on your part, as we understand it, if anything can be done to make the situation less of a burden to the consumers of linseed oil.
>
> "This is a subject of great enough importance to crushers generally to call a special meeting of the council members. In our own case nearly all the oil that we can possibly turn out this month and well into August is due to our customers on contract, and the price far below the present cost to produce, but we would be quite willing to show to the consumer that we are ready to run our mills for a reasonable length of time turning out to consumer linseed oil at cost to produce. This could be fairly well arrived at by having crushers agree on a working down figure and, of course, the market prices of seed each day; the price per bushel, should show very nearly the cost to produce and we believe that for sometime the crusher has been selling linseed oil each day for less money than it cost him to

produce from seed purchased that day.

"If one or more crushers are long a lot of seed on which they have enormous profit, they are certainly entitled to great credit if they are quoting and selling this oil for less than it would cost them to replace it from seed purchased at the same time, but it has appeared to us at times that quotations have been sent out for oil at less than cost to produce and that orders would not be accepted for early delivery, at any rate at these quotations. This has caused great dissatisfaction because agents would state that competing crushers were quoting less than our price, and we have been at some loss because an occasional agent has taken the liberty to meet quotations.

"Conditions are certainly very unsatisfactory to the producer and consumer of linseed oil and we are not sure that a meeting of crushers could straighten them out. You are aware, no doubt, that for sometime Argentine seed prices have been higher than ours and we believe the sharp advances in our market have been largely caused by a continued short interest, and even now the farmers with growing crops who made legitimate sales against their expected October seed, are having the life squeezed out of them in calls for margins.

The Mann Bros. Company replied as follows (R. 751):

"1. Replying to your letter of July 8th with reference to the above subject. The lin-

seed oil industry is on an unfortunate basis, due to the excessively high prices, and will be likely to suffer from it later on; but it hardly seems that anyone in particular is to blame. It is simply a peculiar condition arising out of war effects coupled with very short crops of seed. It would be next to impossible for crushers to offer linseed oil at materially lower prices in any quantity. They have not got the oil; and, even at present excessive prices, many buyers are refused.

"2. If anything can be done to lower the prices of seed on the next crop, it would meet, we are very certain, with approval. It would be well for the council at its next meeting to take up the subject. It might be possible to adopt a course that would result in lower prices for seed. Again, we repeat, the situation is most undesirable and unfortunat for the industry.

The American Linseed Oil Company replied as follows (R. 752):

"Unfortunately market letter No. 587 was put in the files without having been seen by the writer.

"We think that you wrote this letter without having any information as to replacement costs and that a glance at the actual facts would have made it unnecessary to have written it.

"On July 8th the cash flax market was $5.76; our price was $2.10 in car lots, Min-

neapolis. Cost of replacement on the basis of market according to our figures was $2.05 a gallon.

"On July 11th cash flax market was $6.18. On this basis cost of replacement was $2.17 per gallon and our price was $2.15, Minneapolis.

"On July 18th cash flax market was $6.01; on this basis replacement was $2.11 per gallon, our price $2.15, Minneapolis. We do not think that we could be criticised on the basis of these figures.

"We also criticise your viewpoint when you say in the fifth paragraph 'that it is quite probable that the present abnormally high market for flaxseed is somewhat due to speculation on the part of the crushers.'

"We can see no evidence that the present high price of flaxseed has been due to any speculation on the part of the crushers. Indications are that this condition has been brought about by speculation outside of legitimate channels.

Midland Linseed Products Company replied as follows (R. 753):

"1. We are in full sympathy with the motives which lead you to discuss the question of prices at this time. We desire to follow a broad merchandising policy and as far as possible lend our assistance to all of the linseed oil consuming trades. We, as well as

other linseed crushers, recognize that the industry owes certain public obligations which should be carried out as far as possible. No doubt the stabilization of prices at this time is such an obligation. With the practical points in your letter we find it difficult to reconcile ourselves.

"2. If the paint manufacturer can not afford to pay present prices for linseed oil, we think anyone familiar with the paint industry will agree that the few cents per gallon maximum profit that the linseed oil crusher receives will be but very little assistance to him. As far as the United States is concerned, the present price of linseed oil is not due to abnormal demand caused by conservation during the war period. On the contrary, the consumption for this crop year is below the normal consumption of pre-war years. The present predicament of the paint manufacturer in the United States is due to his lack of foresight and failure to purchase linseed oil during the period November to March, at which time he was urgently advised to buy by nearly every linseed crusher. As a consequence crushers were obliged to postpone purchasing their import requirements until a famished Europe became a competitor in the foreign linseed markets with the resultant higher prices that exist today. Speculation on the part of American linseed crushers has been no factor in the advance. We believe there has been no speculation on the part of such

crushers except in so far as they were obliged to provide seed requirements in the early part of this crop year against which they were unable to make any linseed oil sales. Such importations have had no adverse effect on the linseed oil consumer, but on the contrary have, to some small extent, operated to retard in linseed oil prices in this country. Admitting that it is very undesirable to encourage the use of substitutes for linsee doil, it mut be evident to everyone that under the existing conditions it is quite impossible for the linseed crusher to take any measures which will have any effect on the use of soya bean oil at $1.30 per gallon as a substitute for linseed oil at the present time.

"3. It appears to us that the linseed crushers, the paint industry, and all other linseed oil consumers are facing an economic tide which it is quite useless to resist. The paint manufacturer may as well learn to base his prices on the cost of the materials he uses. The assistance that the linseed oil crushers are able to give them would be but very little service under conditions existing today. If the linseed oil crushers supply the linseed oil consuming trade in this country they must compete with European buyers in the linseed markets of the world. It seems to us that it is purely a question whether the consumers prefer to have linseed oil at the present high price or prefer to go without."

The Toledo Seed & Oil Company replied as follows (R. 754):

"We have read with a good deal of interest your letter on the above subject.

"It is without question a subject that is not only worrying the manufacturers and consumers of linseed oil, but the manufacturers and consumers of practically every other product.

"There are two sides to the question, that is, the manufacturers' side and the consumer's side. So far as the consumer is concerned he is not interested in the question of whether the manufacturer makes money, loses money, or breaks even, so long as he is able to purchase his linseed oil at what he thinks is a reasonable figure. So far as the manufacturer is concerned, he is anxious certainly to furnish the consumer with his linseed oil at the lowest possible price, which, at the same time, allows him a reasonable margin of profit, but not a loss.

"Now, what is a reasonable price for oil and what is a reasonable profit are relative matters. All commodities are high at the present time. What six months ago would have been considered a high price would today be considered very reasonable. What today is considered a reasonable profit, based on prevailing high costs, would have been considered two years ago excessive. We doubt very much whether the manufacturing of oil today

at actual cost or even at a loss would solve the problem. As a matter of fact, we are facing the inevitable law of supply and demand.

"Now, if the crushers could secure their seed at $1.00 or $2.00 per bushel less than they are paying at the present time, the price of oil would automatically drop with the price of seed, and to a price which all would admit to be reasonable in comparison with other commodities. Reducing the price of seed by any legitimate or legal means, without other commodities which the farmer buys being likewise reduced, would create considerable antagonism on the part of the farmers, discourage the raising of flaxseed, and ultimately result in our having higher linseed prices than we have at the present time.

"However, if it is possible to accomplish anything along the lines suggested it would seem to us a better policy to attempt, at least, to purchase our flaxseed at a reduced price, eliminating as much as possible any unnecessary expense between the producer and the consumer.

"It is possible that if the element of speculation were removed from the flax market the farmer would get just as much for his seed and at the same time it would reach the crusher at a very much less figure.

"This point undoubtedly will be touched upon by others more experienced in that end of the game.

"It certainly is a subject well worth the serious consideration of the council and undoubtedly will be thoroughly discussed at the next meeting."

MARKET LETTERS.

On Page 46 of Government's brief it is alleged that efforts were made to prevent one member from bidding against another and in support of this allegation, the Government quotes excerpts from correspondence bulletined by the Bureau with respect to a sale made by the Ankeney Company's Agent at Kansas City. It will be noted from the correspondence, quoted in full below, that no effort was made in this transaction to prevent any one from bidding against another. The sale had been made before any correspondence was bulletined and all that the Bureau did in this case, was to advise the subscriber that sales ought to be made at the individual subscriber's prices and not at his competitors' offerings as reported to him by the buyer. In other words, what the Bureau was contending for in this particular transaction, and advocated continuously to each subscriber, was the fact that each member should base his prices on what he considered his oil was worth and the competition revealed by the accurate, dependable information from the Bureau and not upon the doubtful information given him by some purchaser.

The correspondence reads as follows (R. 355):

SALE BY ANKENEY LINSEED MFG. CO.

The sale covered by the following letter illustrates so fully that the old Bunkum Buyer methods are still effective with the spineless salesman who is also still in our midst that the Bureau publishes it as a market letter rather than as a special sales report.

"Midland will assist in checking the buyer's statement in this case if he will at once investigate his agent's quotation.

"Let us have our respective agents and salesmen educated as soon as possible to the point where their sales will be made at their prices, not at their competitors' offerings or reported offerings—and we shall then find that we have real salesmen, not ordertakers, and the industry will be better for it."

"Des Moines, Ia., Nov. 9, 1918.

"ARMSTRONG BUREAU OF RELATED INDUSTRIES,

CHICAGO.

"Subject: Sale below our quoted price.

"Gentlemen: We received the following letter from our broker in Kansas City:

" 'I took the liberty of taking an order of five barrels of oil from Evans-Smith at $1.50 from the absolute assurance that they had quotations of one other factor at this price, I believe it was Midland. Hope that this action was O. K.'

"Upon receipt of this letter we wired as follows:

" 'Can not accept five barrel order Evans-Smith at the price. See letter.'

"We now have this letter from the broker:

" 'We have your wire on oil and will be guided accordingly. On Evans-Smith's order, your word came too late as you already have our delivery report on this order. Mr. Price gave me his word of honor that he had a price of $1.50 from a responsible concern and we could not question him as he said to forget it if we did not want his order at this figure we were urging him for the business.'

"This is the sale one cent under our quoted prices for Kansas City. Our broker seems convinced that the Evans-Smith Drug Company actually had the quotation of $1.50 raw basis. See if you can find out who made this quotation on November 5th.

"Yours very truly,

"ANKENEY, LINSEED MFG. CO.,

(Signed) "R. P. BOLTON.

"P. S. Will add to the above that our Kansas City representatives have now been instructed emphatically to stick strictly to our price list, and in the future not accept any such statements from the trade in order to effect sales. H. E. A." (R. 355-356.)

This is another instance where Government's Council shows he either does not understand the functions of the Bureau or is attempting to put a construction upon correspondence and market reports which is not supported by the record.

At a meeting of the Council on January 23, 1919, discussion was had as to whether the respective price lists of the members on file with the Bureau represented delivered prices on carloads only, and the answer to the question was in the affirmative. There was no resolution adopted that this practice should be followed nor was it recommended at the meeting.

On January 31, 1919, the American Company wrote the Bureau advising of the merchandising plan it had placed in effect with its selling stations on l. c. l. shipments whereby its zone prices included freight allowance to destination on direct shipments of full car lots, and in cases of less than car lots its price was f. o. b. cars where they carried stocks. It requested the Bureau to advise it whether other Council members were following the recommendation which was made at the last meeting in this respect (R. 386).

That the American Company was mistaken in stating that a recommendation was made at the meeting of January 23, 1919, with respect to this matter is shown from the minutes themselves offered in evidence by the Government, paragraphs 21, 25 and 26 of the minutes reading as follows:

> "21. As the bureau had been commissioned at the last meeting to obtain figures showing the freight costs on oil per gallon from

Minneapolis as a basis the different distributing centers where oil was carried in warehouses by various council members, Mr. Armstrong, for the Bureau, distributed a sheet of such tabulations as prepared by the Lent Traffic Service of Pittsburgh, the rates listed thereon being given in cents per ton for meal, cents per 100 pounds, and cents per gallon for oil in tank cars, together with cents per gallon for oil in barrels.

* * * * *

"25. In order to secure definite analysis of such price lists the roll was called on the question as to whether or not the various price lists of the council members now on file with the Bureau and covering the present freight zone system could be stated to represent delivered prices on full carloads only until such council members should advise to the contrary through the bureau. The answer to this question was unanimously in the affirmative.

* * * * *

"26. NOTE.—The Council members are advised by the Bureau that while their answer to the above question is to be accepted as a system to their present basis of making their respective quotations, and clearing same through the Bureau, there are no restrictions whatsoever in making any changes that they may see fit to make in such policy excepting, of course, that they shall at once advise the Bureau fully and completely when such changes have been made." (R. 381.)

From the above it is also apparent that the Government was not correct in its statement appearing on page 55 of its brief that "here was first in a meeting a specific recommendation made to the entire membership." Paragraph 26 quoted above clearly emphasizes the fact that there was no uniformity in practice sought and that any member had the right and could at any time make any change he desired.

The replies of the members on this subject are that several did not quote less than carload prices and one member replied that to a considerable extent it was applying its selling prices in the manner described in paragraph 25 of the minutes and that due consideration was being given to the matter to arrive at an end both proper and equitable. (R. 401-03). The statement of this member would certainly imply that so far as his company was concerned they felt they were at liberty to use or disregard any method of merchandising in the various zones.

Suppose, however, as a matter of fact, the subscribers did recommend that each ones price list as cleared through the Bureau on the zone plan of reporting should apply to his carload quotations only and that less than carload quotations and sales were to be made or reported on the basis of such seller's prices f. o. b. mill or points where his or competitive stocks were carried in ware-

houses. Could there be anything suggestive of a restraint of trade in such a recommendation for the accurate clearance and identification of competitive market information so long as no suggestion was made as to what prices should be quoted on either carload sales or less than carload sales?

Oil sold F. O. B. point of delivery or destination bear no relation to an unlawful agreement to enhance, fix, or retard the lowering of prices.

REPORTS TO THE BUREAU

The Government in its brief (pages 49-55), cites excerpts from the record of steps taken by the Bureau to speed up reports of market information from each subscriber. It does not in any way state wherein the effort of the Bureau in this respect was for the purpose, and had the effect of lessening competition or unduly affecting prices, nor is there any statement by the Government that the speeding up of reports of market information did not bring about keen competition.

The insistence of the Bureau upon promptness in reporting is covered by a provision of its service contract which provides

> "Each subscriber hereto recognizes that the efficiency of the Bureau and the value of the information secured, collected and distributed by it and the benefits to be derived therefrom are dependent upon the accuracy, punctuality and completeness of reports and information

received from its subscribers; therefore each subscriber to this contract hereby further agrees for itself and all those whom it shall lawfully control:

"To promptly make, have made, and have sent in and to said Bureau * * * full, accurate, complete, signed and certified reports of said sales, quotations and offerings or other information required by the Bureau, correct replies or answers to any and all inquiries concerning the same or seeking any information in regard thereto." (R. 171.)

Market information to be of any value from a competitive standpoint must contain its full measure of news value, accuracy and completeness. Market information covering the prices at which a product is changing hands in that market to be of any value to a merchant who wishes to move his product promptly must not only be accurate, complete, and dependable, but must carry to such seller news of the *lowest going prices of the moment.*

Defendants' Exhibit No. 2, "32 Years of Linseed Oil Prices," shows that the competitive spread between the spot quotations of the high and low sellers average but a few cents per gallon, with many of these months showing only one cent spread and many months with all quotations even. This shows that linseed oil, like flour and sugar, changes hands in normal times largely on the price argument which need only be a cent or two per gallon

under other competition to get the business.

Storage capacity for both oil and meal is a highly important factor of cost as well as a price making factor which often forces a crusher to move his stocks or assume *holding hazards* which could well jeopardize his entire business. If he is not afforded prompt information as to revisions downward of prices of his competitors, he is likely to find himself with a large quantity of oil on hand and the trade supplied by his competitors. On the other hand, if he receives prompt information of such revisions and he wishes to dispose of his product, he not only will meet the downward revision in price but may go lower. Thus the insistence of the Bureau on promptness in reporting price changes works for keener competition instead of restricting it.

The incident of Archer-Daniels referred to by the Government on page 54 of its brief is a case in point. Archer-Daniels, as testified to by Mr. Mairs, has agents and brokers selling oil, scattered all over the United States. Whenever that company made a change in price they not only quoted the trade, but they advised their selling agents and brokers before advising the Bureau of such change in price. The service contract provided that a subscriber should notify the Bureau at once, and by wire, if such price represented a reduction from his last reported price, after the

quotations had been given to the trade. It is at once seen why the Bureau objected to the Archer-Daniels Company advising its brokers and agents throughout the United States of a changed quotation before it had been sent to the Bureau. This delay in reporting not only by Archer-Daniels but by other subscribers, was sensed by the Bureau before it sent out market letter dated October 1, 1919, "Delay in Reporting Price Changes Through the Bureau." (R. 488-489.)

Such intentional or unintentional evasion of the Bureau's contract provisions for promptness of reporting therefore required some action by the Bureau, and it was taken in such form as to become a clearly understood and accepted additional provision of its service contract with each of the defendant crushers.

The record shows that all market information was properly gathered and cleared and was only the kind of information necessary to the intelligent operation of the business of each defendant company, and was only such information as the defendant crushers had in the past been attempting to gather for themselves at great expense and slowly.

William O. Goodrich testified that he was "under great deal more of a handicap than some of the larger ones, in that I do not have the diversified means of obtaining information as to market con-

ditions and conditions of the trade. I was dependent largely upon such information as I got from the buyers of linseed oil as to what was doing." (R. 93.)

Judge Carpenter in his opinion makes some interesting statements and conclusions bearing on this exchange of market information as it has to do with the competitive prices and sales, and the need that such and other market information shall be at the "instant command" of the merchant, "reliable and adequate," immediately to be secured and more or less permanent in form. Judge Carpenter said: (R. 45.)

> "Business is no longer a game of chance, but a matter of scientific calculation.
>
> "A merchant cannot compete with another merchant unless he knows what he must compete against. A knowledge of what his competitor is charging is the first step in competition. It does not follow because one man knows the price which his competitor is asking, and he then fixes the same price, that his action is by agreement. If his competitor charges a high price, he naturally will ask the same price if he thinks he can get it. It is absurd to imagine that every merchant does not endeavor to keep posted on the prices asked by his competitor. If he fails to keep posted he will find himself losing money. If his prices are too high his customers leave

him. If too low, he fails to reap the profit to which he is entitled. The Government cannot seriously contend that it is the duty of every merchant to guard against his competitor finding out what he is charging. It would be an impossibility. Nor is it wrong for a merchant to endeavor to find out what his rivals are charging. If he cannot get it directly and easily, he will necessarily get it indirectly and at a great expense and slowly."

The Government seeks to show by the testimony of Mr. Mairs of the Archer-Daniels Company and Government Exhibit 17 (R. 675), that that Company was transmitting through the Bureau prices that had not been quoted the trade. Mr. Mairs' testimony with reference to Government Exhibit 17 is as follows:

"I have never to my knowledge sent price information to the Bureau which had not already been quoted to our trade. The statement in the telegram (plaintiff's Exhibit 17) 'From 17th November wired Bureau before writing agents at Bureau's request ten minutes,' means that we wired the Bureau ten minutes before we wired our quoted price to our agents. The reason for that was to get the information to the Bureau quicker. We quoted a price and immediately wired the Bureau before notifying all our agents in the field so that our competitors might be in a position to compete with our price as quickly as our

agents would be. We continued that practice after November 7. During our affiliation with the Armstrong Bureau we never made quotations or reports therein in any other way than as directed by the contract." (R. 102.)

On cross-examination Mr. Mairs testified:

"The third sentence in the telegram (plaintiff's Exhibit 17) means that we quoted a price and then wired the Bureau and after that advised our agents of our quoted price. It does not refer to special sales.

"Carpenter, J. Was there a special request by the Bureau for this particular information?

"A. The Bureau asked us to give them the information before we took the time to give it to all of our agents."

The above shows that Archer-Daniels did not file quotations with the Bureau that had not been given the trade prior thereto, and why the Government in its brief attempts to distort the testimony of this witness can only be explained by the necessities of the Government in its attempts to justify its contentions that the whole service of the Bureau tended toward and resulted in an unlawful combination and conspiracy in restraint of trade or possibly as is evidenced many places elsewhere in this brief through obvious lack of knowledge of general business practices. In this instance the Government's confusion arises from classifying as buyers or consumers the distributive agencies of this seller.

SERVICE OF THE BUREAU.

The Bureau on several occasions attempted to extend its service to linseed oil manufacturers who were not in the Council. These efforts were twofold: First, Armstrong believed, and now believes that the service rendered by the Bureau to the various industries is in the interest of not only the manufacturer, jobber and retailer but the consuming public as well, and that more units of a particular industry obtaining the dependable market information of the Bureau would result in greater elimination of unfair, uneconomic business practices, which in his long experience he had found injurious to American business interests; secondly, the larger the number of subscribers, the greater the financial income to the Bureau with the corresponding result of greater effort on its part to bring about efficiency and fairness in business management that would benefit each particular industry, from the standpoint of the seller, buyer and consumer. Armstrong was not trying to increase membership of the Linseed oil council by the addition of the Fredonia Co. to enable it or the Bureau to more thoroughly bring about a conspiracy or combination to enhance, fix, or retard lowering of prices. This is particularly true in view of the letter received from S. H. Wiley, President of the Fredonia Linseed Oil Works Company, wherein Mr. Wiley stated that "our legisla-

ture is in session in Kansas now, and a newly elected Governor is securing the passage of the most drastic legislation, giving the Attorney General and even local county attorneys exemplary powers in the regulation of commercial enterprises." Armstrong knew, however, that the Bureau's service to the crushers was not for the purpose of conspiring or combining to artificially affect prices or production and was quite willing that the plan of the Bureau should be submitted to the Attorney General of Kansas, and at once took steps to that end.

Market Letter No. 715 on this point, submitted in evidence by the Government, in part reads as follows:

> "Council members have already been advised of previous correspondence between the Bureau and the Fredonia Linseed Oil Company on the question of their subscribing to this service.
>
> "It will be a matter of interest to the council to know that the Bureau has been persistently following this up with Mr. Wiley, their president, to the extent that we have now carried the question before Hon. Richard J. Hopkins, Attorney General of the State of Kansas, the reason for that action being that Mr. Wiley finally took the stand that the laws of his State were designed to prevent any cooperation whatsoever between competitors, or words to that effect.

"Upon receipt of that statement the Bureau secured a complete set of the laws of the State of Kansas bearing on cooperation, and after a careful study of the same, while admitting that they were drastic and far-reaching, we were still pleased to note that they had no bearing on the form of cooperation as directed by the Bureau.

"Following our conclusions we so advised Mr. Wiley; we also wrote Mr. Hopkins, the Attorney General, and without making reference to the particular manufacturer in question we advised that one of the manufacturers in his State was being deprived of very substantial benefits from lawful cooperation which he might obtain through his subscription to this service, and which he was not obtaining by reason of his evident misinterpretation of the laws of the State of Kansas.

"We asked the Attorney General if he would be willing to pass comment on the explanation of our service which we would make to him in person, so that we might then take his statement to the manufacturer in question.

"We received an excellent letter from the Attorney General in reply, expressing his willingness to proceed with the plan as suggested. Upon receipt of this communication we immediately advised Mr. Wiley that we were prepared to go before the Attorney General on the condition that if his comment was favorable we should then expect the immediate

enrollment of the Fredonia Company." (R. 465.)

In a letter dated April 28, 1919, to the Canadian Linseed Mills, Ltd., of Montreal, Canada, the Bureau, after pointing out that an exchange of information could be had between the American companies and the Canadian Companies said,

* * * * * *

"5. We believe that such a service as this Bureau affords, and which we have been affording for upwards of three years, is an absolutely necessary service, because we do not believe that it is possible for any group of manufacturers to maintain an agreed price (even though such agreements were lawful in this country, which they are not) for any length of time, as such agreements can not be carried out under the law of business economics, and disappointment is bound to result." (R. 446.)

* * * * * *

We agree with the Government as stated on page 57 of its brief that "these statements of the Bureau indicate its real purpose, and from experience what it actually accomplished," and the record of the proceedings in the lower Court conclusively indicates, we assert, that the Bureau was at all times sincere in its efforts to bring about honest, economic and intelligent business prac-

tices for the benefit of the manufacturer, distributor and consumer.

The President of the National Paint, Oil and Varnish Association under date of Sept. 2, 1919, sent a letter to the Bureau suggesting that it connect itself with that Association. The Government in its brief (pages 58-60), quotes portions of the letter which we take it the Government considers evidence against the Linseed Oil Crushers. That the Court may know, however, that the entire letter from the Association is not quoted in the Government's brief and that a portion of said letter very aptly fits the service of the Bureau as rendered the Council members, the following excerpt is quoted:

* * * * * *

> "For instance, I do not see that it would do any harm to the Flaxseed Crushers Association to communicate to the N. P. O. & V. Association the ruling prices of linseed oil and oil cake for the month preceding the report, or such information as it has regarding the acreage planted to flaxseed, the condition of the crops in the United States, Canada, Argentina, and India as reported to the public, and any other statistical information of this kind.
>
> "You are very careful in your association never to discuss future prices or to make any agreement or understanding which could be considered as in restraint of trade or prevent-

ing competition. *The very fact that you are reporting this information to the large buyers of your product would give a reason for the existence of your association that would be unobjectionable to the general public. You can not call this a trade secret or information that you would like to keep in your own hands, because every member of your association gladly gives this information to every important buyer who seeks it.*" (Italics ours.) (R. 469.)

* * * * * *

When it is recalled that the members of this National Paint, Oil and Varnish Association consisted very largely of buyers of linseed oil, representing in fact the greater consuming trade of the industry, no comment seems necessary as to whether or not the operations of the linseed oil council through the Armstrong Bureau was a combination or conspiracy in restraint of trade or commerce or was intended, or in fact, did injuriously affect the business of buyers of linseed oil. The reply of the Armstrong Bureau to the Association's letter is in part quoted below:

* * * * * *

"1. In behalf of our clients in the council above referred to, Mr. Cornish, the writer is authorized to advise you that at our last meeting in New York on Thursday, Sept. 18th, the entire correspondence between your asso-

ciation and this bureau was carefully reviewed, and the suggestions which you made covering the matter of furnishing to your association the statistical information requested was given full consideration.

"2. It was pointed out that much of the general statistical information which you suggested should be so reported was not now being gathered by this bureau, as it is, as you know, market information which is officially collected and published by outside sources.

"3. The general suggestion emphasizing the public service result met with the council's full approval, as it is quite in keeping with the efforts of this council in its cooperative work under the direction of the Armstrong Bureau.

"4. The meeting, however, was clearly averse to the intimate alliance with your statistical bureau, as suggested, possibly because of the fact that our group is not altogether in sympathy with the association plan of cooperation, and prefers to maintain and emphasize their present identity as individual subscribers to this cooperative service.

"5. On the other hand, the meeting was quite in sympathy with any amplification of the present exchange of statistical information which would work out to the mutual advantage of both buyer and seller, and to that end the Bureau is commissioned to suggest for the consideration of your association an exchange of statistics.

"6. That is, the linseed crushers would be glad to authorize this bureau to furnish to your group of buyers certain statistical information of interest to them as buyers in exchange for similar statistical information from those buyers which would be of interest to our group as sellers; and you will appreciate, I am sure, that on some such plan as this very great benefits could be worked out. To that end, however, it would probably be a point in question whether or not your association members, under their plan of cooperation, could assure our group of subscribers the same full and accurate market information which we could assure your group of buyers were this exchange of information decided upon." (R. 486.)

* * * * * *

RESIGNATION OF SPENCER KELLOGG COMPANY

The Government in its brief (pages 60-62), refers to the resignation of Spencer Kellogg & Company, and would have the Court believe, contrary to the record, that the reason for such resignation was because the Bureau and its members had artificially increased prices of oil to such an extent that the business had become an attractive field for newcomers. Government exhibits 3 and 4 show that on January 20, 1920, date of Spencer Kellogg Company's resignation, the price of linseed oil was lower than it was when the linseed oil

council first began to operate, and was much lower than it had been for a considerable period of time, not only prior to the formation of the Council, but for some time just prior to the date of the resignation.

The Government states that the principal reason assigned by Spencer Kellogg for resigning was that the Bureau had caused other concerns to enter the industry, which would bring about over-production. We unqualifiedly deny that there is any statement in the record that would justify such an unwarranted assertion by the Government. Below is quoted letter from Spencer Kellogg Company stating its reasons for resigning:

"January 20, 1920.

"Armstrong Bureau of Related Industries,
"Chicago.

"Gentlemen:

"Referring to market letter No. 1156 and 1180, for quite a long time we have been discussing the advisability of continuing in the bureau. The mere fact that the crushers are members of this bureau (of course in a strictly legal way) has the effect of calling the attention of outside capital to the linseed oil business. This is only history repeating itself, and the writer has seen it happen a great many times in his life. It has happened with the linseed oil business and it has also happened with other businesses.

"The war is over, although not strictly speaking, but for all intents and purposes, it is over. This bureau has filled a want that was encouraged by our Government to get together so that they could deal with one unit. This necessity has also passed. So we feel that for the good of all we are taking a proper stand in advising you as per enclosed confirmation of telegram of our withdrawal from the bureau.

"We take this opportunity to thank you for all the courtesies that you have shown us.

"Sincerely and cordially yours,

"SPENCER KELLOGG & SONS, INC.

"Spencer Kellogg, *President.*"

(R. 591.)

The Government makes the further unwarranted statement that "it was manifestly thought that this was brought about by an increase of prices, thus making it an attractive field for one entering business." Who "manifestly" thought this does not appear in the record, but we venture to suggest that it "manifestly" is a "thought" which had its inception only in the mind of Counsel for the Government. Many portions of the record show that with the exception of a short period prices were lower during the operation of the Linseed Oil Council through the Bureau than they were before. Further, Government Exhibit 6 (a chart) shows that for a considerable time lin-

seed oil was being sold by members of the Council, including Spencer Kellogg Company, below the cost of replacement.

Market Letter 1252, offered in evidence by the Government states that Armstrong had a conference with Messrs. Spencer and Howard Kellogg, and that their resignation as explained to him was based on the fear that there would be further expansion in some of the present plants or the building of additional plants by other interests, and that the constructive results accomplished for the industry through the efforts of the Council under the Bureau's service directly contributed to that end. (R. 590.)

Nowhere in the record does it appear that Spencer Kellogg Company feared an over-production, and if the statement of the Government appearing on page 156 of its brief had its foundation in fact, there were no grounds for fearing over-production, for as stated by the Government in referring to production,

> "* * * the production of linseed oil is limited by the quantity of flaxseed on the market an excessive over-production of oil being therefore very improbable." In this respect the industry is unlike that of lumber in which the raw material, for the present at least, is unlimited." (Page 156, Government brief.)

Further, it should be pointed out that Spencer Kellogg Company in its letter above quoted stated that the members of the Bureau acted "in a strictly legal way."

We therefore assert that if the resignation of the Spencer Kellogg Company proves anything it is that the service of the Bureau to the Linseed Oil Council had been clean, upright, and constructive, and it would not have been surprising if there were outsiders who might have been considering the advisability of entering such a clean field. The Government states, however, the reason why others did not enter the field was that there "must have been a tacit understanding among the producers and fear entertained by the outsiders of the close combination of the producers through the Bureau."

This is to say the least, the first intimation that the defendants had in any way conspired to prevent others from entering the industry. All data with reference to the withdrawal of Spencer Kellogg was offered in evidence by the Government, but it never in any way by oral testimony or written data attempted to show that there was ever any attempt made to prevent others from entering the industry or to prevent the subscribers from enlarging their plants, or that there was ever a thought in the minds of Armstrong or the other defendants that such a thing should be done, and the proof of this, we assert, is in the fact that the

Spencer Kellogg Company resigned because they feared enlargement of the present plants of their competitors or the entry in the industry of new factors. If there were any thought of such a tacit understanding as insinuated by the Government it is strange, indeed, that the Spencer Kellogg Company, a dominant factor in the industry, did not seek to increase the restriction instead of resigning.

Shortly after the withdrawal of Spencer Kellogg Company, the Midland Company withdrew from the Linseed Oil Council. Elsewhere in this brief it is shown and supported by the record (Government Exhibit 9) that the Spencer Kellogg Company and the Midland Company were the largest and most dominant factors in the linseed oil industry controlling half the total production. If the Bureau and its members had combined and conspired to artificially fix, retard or prevent the lowering of prices surely the resignation of these two companies would have at once put an end to such combination and conspiracy, because it is undeniably the fact that no combination or conspiracy can succeed when the most dominant factors in an industry are not in it.

It is a matter of record, however, that up to the time the proceeding was commenced by the Government, there was no indication that the remaining members, although small in comparison with

the Spencer Kellogg and Midland Companies, contemplated giving up the services of the Bureau.

The resignation of Spencer Kellogg Company was because the work of the Bureau had "advertised" the linseed oil industry and made it attractive. Now let us assume that before this resignation, the Bureau and its members were in a combination or conspiracy to artificially affect prices; afterwards Spencer Kellogg and the Midland Company get out of the combination and conspiracy. Could it still go on without them? If the members remaining in the Bureau were still working under a combination or conspiracy in restraint of trade and thereby continuing to make the linseed oil industry attractive, and the members would increase their plants or newcomers would be encouraged to come in the field, why did Spencer Kellogg Company state in its letter that the Bureau was operating "in a strictly legal way"? The attempt of the Government to use the resignation of Spencer Kellogg in support of its contention that the defendants had combined and conspired to artificially affect prices is so weak and far afield that it suggests the thought that Counsel for the Government is "catching at a straw." But the resignation of Spencer Kellogg Company cannot even be typified by the term "straw" in support of the contentions of the Government in this case. The word more fitting would be "wind." We assert

that the resignation of Spencer Kellogg, and the reasons given therefor, evidence the fact that there was never any combination or conspiracy between the Bureau or its members and none was ever attempted."

TERMS OF SALE

The Government in its brief contends that the terms of sale of the defendant crushers constituted another factor in the alleged combination and conspiracy to unlawfully restrain trade. On page 62 of its brief it quotes an excerpt from the minutes of the meeting of January 23, 1919, with reference to the terms of sale, but that there was no uniformity in terms prescribed by this recommendation is shown from the following extract from the quotation in the Government's brief:

> * * "All members instituting these recommendations *or any others*, shall advise the Bureau of such action not later than January 27." (R. 379.) (Italics ours.)

At the meeting above referred to the terms recommended were 1% off ten days, or 30 days net, trade acceptance from the date of shipment. The Government on page 64 of its brief states that,

> "Apparently all had adopted the discount recommended."

The following excerpts from correspondence from the members to the Bureau at a time when "trade acceptances" were being universally advocated by bankers and business men show whether or not the statement of the Government is in accord with the record.

"Ankeney Linseed Mfg. Co. (3-11-19):

"We have not as yet put the trade acceptance into practice. Practically all of our sales are confined to the jobbing trade, and whom we are glad to say, discount their bills. Our customers who do not discount their bills are a very small part of our trade indeed, and we see that they pay up promptly in 30 days." (R. 427-428.)

"William O. Goodrich Company (3-11-19):

"We have been practically out of the market since making our terms on linseed oil 1% for cash within ten days of shipment or thirty days' trade acceptance net, but what few sales we have made have gone to customers who take the 1% discount. Consequently, we have really had no experience with trade acceptances, but we are anticipating no objection to them on the part of buyers." (R. 428.)

"Minnesota Linseed Oil Company (3-7-19):

"We have adhered to terms on oil, 30 days or 1% in ten days, but have not adopted trade acceptances." (R. 429.)

"National Lead Company (3-15-19):

"Our company has repeatedly informed

council members that we do not use trade acceptances, and likewise have declared on more than one occasion our purposes not to do so." (R. 429.)

"The Sherwin-Williams Company (3-13-19):

"Inasmuch as we do not make shipments to concerns other than our own factories, we have had no experiences asking for trade acceptances." (R. 429.)

"Midland Linseed Products Co. (8-8-19):

"For several months all of our Linseed Oil contracts have named the terms recommended by the Linseed Crushers' Council, namely 1% discount for cash or a 30-day trade acceptance. These contracts have been accepted by the buyers without question. We have made a systematic effort to enforce these terms.

"As far as we can learn, no serious effort has been made by any other member of the Linseed Crushers' Council to carry out the 30-day trade acceptance terms. We believe the use of the trade acceptance would be beneficial to the industry, but unless there is soon to be a general effort on the part of our competitors to use the trade acceptance, we shall discontinue our efforts in this direction." (R. 457.)

"The Mann Bros. Co. (8-9-19):

"We have not found it necessary as yet to adopt the thirty-day trade acceptance. We still sell linseed oil on the terms thirty days net or less 1% for cash in ten days from date of shipment. We have very few customers

who do not discount the bills, and those few we insist upon payment at the end of the thirty-day period, and so far all has worked well. Should we have any trouble in our collection will be glad to start the thirty-day trade acceptance, but at present writing we do not find it necessary." (R. 457-458.)

Mr. Mann further testified that the terms of sale of his Company had always been thirty days net or 1% off in ten days. (R. 72.)

William O. Goodrich testified that for the last twenty years, at least, the terms of sale had been thirty days and 1% off for cash in ten days, and that while there was some recommendation made with reference to trade acceptances he never tried to use them with any of his customers. (R. 94-95.)

In view of the above we assert that the Government's contention, that members of the Bureau had agreed on uniform terms of sale and were living up to such agreement, is not supported by the record.

CARRYING OIL IN STORAGE FOR CUSTOMERS AFTER PURCHASES

After a thorough discussion at the meeting of the Council on December 3, 1919, it was stated, and nowhere denied in the record, that "a very substantial expense to the seller was involved" in carrying oil for the buyer after the contract period for the taking of such oil had expired; and it was

recommended that the charge for carrying oil after the expiration of the contract period should be one cent per gallon or fraction thereof. The Government in its brief contends that such a recommendation was part of the combination or conspiracy to enhance prices. The record, however, shows that a member of the Bureau reduced his carrying charge to one-half a cent per gallon and under this contract with the Bureau all he did was report the fact.

It is common knowledge that storage charges are not uncommon in many industries and that similar storage charge practices obtain on this industry's raw material—flaxseed—just as is the case on all grain purchased not taken on *contract time* by the buyer. The Government did not try in the lower court to show that the carrying charge recommended was excessive or that anyone complained of such charge. We contend that the recommendation was a fair one, although never uniformly adopted, and had no bearing whatever on any plan to artificially add to the price of linseed oil.

MARKET LETTERS

Many excerpts from, and references to, "market letters" as cleared through the Bureau are set forth in the brief of the Government and are characterized in the usual way by the Government, as

are the minutes of the meetings, also published under the head of "Market Letters." That is, the characterizations are based on unwarranted assumptions, insinuations and suspicions.

On page 70 of its brief the Government begins its discussion of market letters by a subject heading "Inquiries and Exchange of Views Through Market Letters." There is nothing in the record that justifies the unwarranted expression "Exchange of Views Through Market Letters" used by the Government in its brief, and the only reason why the government should use such an expression is for the purpose of creating in the mind of the court the similarity to the practice which was condemned in the Hardwood Lumber case. It will be seen from the record that the market letters referred to by the Government were based on *past transactions*, and were not written for the purpose of obtaining through the Bureau an "exchange of views" which would have the effect of suggesting to the subscribers that prices should be enhanced, fixed or in any way artificially affected. It is indeed inexplicable why the Government of the United States, acting for the people, should attempt to correct what it charges to be an unlawful restraint of trade by innuendoes and statements based on suspicion, but entirely unsupported and contrary to the facts in the possession of its officials.

In the lower court an attempt was made by counsel for the Government to place a construction on certain expressions used by the Bureau and its subscribers, said construction being based not on the record, but on theories and suspicion. The trial judge in his opinion referred to such expressions and said:

> "To my mind some of these expressions are evidence that no such agreement was in fact made, if they are evidence of anything."

The contract between the individual subscriber and the Bureau is before this Court (R. 161). It shows that the individual subscriber agreed with the Bureau to report any change in price *after* the same had been made to the trade. When such information was received by the Bureau it was relayed to the other subscribers. It is not unsual for a manufacturer after he has made a quotation to a prospective buyer and does not receive the order, to feel that he has lost the sale because some competitor has cut below the price he has quoted. It very often happens, however, that the sale was not made at a lower price. It is natural, however, for the disappointed manufacturer to attempt to find out, if he can, why he did not get the order. Hence, many of these inquiries referred to in the Government's brief. From time to time reports would come to these subscribers that such and such

a price was being quoted by such and such a subscriber. The subscribers knew that for many years the industry had been infested with "sharp buyers" who endeavored to cut prices by spreading false reports as to what competitors were quoting. These subscribers also knew that if they wished to get accurate information as to such quotations the Bureau was the place to obtain it. Therefore whenever information came to a subscriber that a certain price had been quoted and he ascertained from the reports received from the Bureau that no such price had been filed by the subscribers, he immediately wrote or wired the Bureau to ascertain whether or not such a price had been quoted and by whom. Very often the Bureau ascertained that no such quotation had been made, thereby establishing the fact that the "sharp buyer" was still on the job. Occasionally the Bureau ascertained that such a quotation had been made but not promptly reported to the Bureau. The record shows in the latter case that all that was ever done by the Bureau or its subscribers was to ascertain why the changed quotation was not reported to the Bureau. There is nothing in the record to warrant the statement by the Government (page 75 of Government's brief) that any one "was given a severe reprimand" for having made a quotation or sale at variance with a price on file with the Bureau. The contract itself specifically provides:

> "(b) Also, to report to the 'Bureau' by prepaid telegraph, and further confirm by mail, duplicate of all quotations made at variance with above price lists, giving better terms to the contemplated purchaser than those quoted." (R. 167.)

This provision of the contract certainly was incorporated therein with the expectation that there would be prices quoted at variance with price lists filed with the Bureau, but the only requisite was that the party quoting the price varying from his last reported quotation should report the same to the Bureau.

The record also shows, however that the Bureau advised each subscriber that he was free at all times to quote any price he wished:

> "Remember also that there are no restrictions, implied, understood or agreed upon, by which you are bound at any time to quote any prices other than those which your judgment prompts you to make. The Bureau's service will keep you advised at all times of the prices quoted on the prevailing market, and it is up to you to undersell or oversell these prices, according to your best judgment, but under the terms of the contract you must keep the Bureau advised of any deviations from your last reported quotation." (R. 335.)

The Bureau did, however, take the position, and the Council recommended, that the quoting of

lower prices to favored buyers was an unfair method of competition and that when a lower price was quoted to a particular buyer such lower price should be made to apply to that particular subscriber's entire trade. The Bureau took this position with respect to lower prices to favored buyers, and the Council endorsed the Bureau's position, because such a practice was considered an unfair method of competition and a price discrimination in violation of Section 2 of the Clayton Act. There certainly cannot be anything unlawful in such a recommendation. However, we contend, and the record plainly establishes the fact, that each subscriber nothwithstanding the attitude of the Bureau and the recommendation of the Council on this point, was free to make quotations at variance with his filed price list, without such action effecting his general quotation to his trade, and as a matter of fact did make such special quotations and sales. The following testimony of William O. Goodrich, one of the defendant crushers, relative to his attitude with respect to such transactions is illustrative of how these defendant crushers changed their prices and policies to suit their own convenience and to meet competition:

> "I was in Philadelphia some time during the winter of 1919 and was talking with Mr. Farr, of the Farr-Bailey Company, manufacturers

of linoleum. They are large consumers of oil. I happened at that time to be rather filled up with oil, and I was rather anxious to dispose of some of it. In my conversation with Mr. Farr I ascertained that he was not interested in the price that I quoted, which was $1.68. I afterwards drew him out to the effect that he would be interested at a somewhat lower price, and I asked him how great a quantity he would buy if he got it at the right price. He told me he thought he might buy 2,000 barrels. I asked him at what price he would buy that amount, and he said, 'Better than $1.60.' I immediately offered him 2,000 barrels at $1.59, and he accepted it. I wired that information to the Bureau, and it relayed it to the rest of the Council members. I made the sale to Mr. Farr at the moment I have spoken of. The price was a reduction of about 9 cents." (R. 94.)

* * * * * *

"I am very glad to say that the incident in Philadelphia to which I have referred is not typical of my relations in selling oil generally. I do not like to think of making as drastic a cut as I did in that particular instance. I am not always obliged to cut the market quite that hard; that is, however, entirely characteristic of my efforts to get business." (R. 94.)

* * * * * *

"I never feel in any way under any obligation to follow the prices of any of my com-

petitors. The fact is that I deviate very often from their prices. Their prices are only a guide to me as to the general condition of the trade. My own price has always been a matter for me to determine, depending on my anxiety to sell and my purchases of seed. I might have been fortunate in buying some seed before the price advanced, so that I was able to make a quite drastic cut without actually losing money, and when there was such circumstances, I did so." (R. 97.)

* * * * * *

"Q. Did anyone ever criticise you for making any kind of a price at any time—that is, any of these crushers or the Bureau?

"A. In the nature of a reprimand, you mean?

"Q. Yes.

"A. No, sir." (R. 97.)

* * * * * *

"The Philadelphia incident was not the only transaction where I undersold my competitors. I needed money, or I would not have made the price, but I did that very frequently. When I had the stock and needed the money, I made the price that would give me the customer, and what anybody's else's price was had no bearing on the question." (R. 99.)

The Government alleges in its brief (p. 78) that these letters were complaints. They were not complaints at all. They were inquiries as to the facts and when the true situation was bulletined by the

Bureau nothing further was said or done with respect to any transactions inquired about. Is there a single letter in the entire record wherein the Bureau or a subscriber stated to another subscriber that such and such a practice had to be discontinued or that such and such a resolution or recommendation had to be carried out? Is there anything in the entire record which indicates that these defendant crushers were obligated to follow the other fellow as to prices, production, terms of sale, or zone differentials? We assert there is not.

These letters constituted inquiries as to purchases and sales of linseed oil reported from outside sources; guarantees against decline; special arrangements with jobbers or purchasers; trade acceptances; allowances for second hand barrels; delayed information forwarded by the Bureau. But nothing is set forth in the Government's brief, nor does the record contain a single written statement from the Bureau to the subscribers or from the subscribers to the Bureau, that the defendant crushers were attempting to enhance, fix, or retard the lowering of prices. And does it not impress this court that throughout the entire proceedings in the lower court and in the Government's brief there is no mention that these market letters were used as part of a plan to artificially affect production? If these defendant crushers were in a plan or conspiracy to artificially affect prices does

it not seem strange that there is not just a little proof in the record that they discussed at the meetings or corresponded through the Bureau relative to the question of limiting production? Our experience is that artificial prices go hand in hand with restricted production. But the Government attempts to show the unlawful purpose of these letters by stating that they "show how persistently a member was pursued for but slight infractions of their regulations," and that they were liable to be called to account for the slightest deviation from the course of conduct mapped out by the Bureau and the Council, "how serious a matter it was for an agent of a subscriber to make a mistake * * * and how a company was liable to be called upon the mat because of such a mistake."

When the Government speaks of "regulations," and "course of conduct" mapped out by the Bureau and the Council, does it mean regulations and course of conduct which artificially enhanced prices, retarded the lowering of prices or fixed prices? We assume that is what the Government means, and we assert that there is not a semblance of evidence in the entire record which supports such a contention. In fact, the letter quoted by the Government on page 100 of its brief relative to the Ankeney Company not acting on its own initiative ought to be convincing that so far as the Bureau was concerned it was not in favor of "reg-

ulations," or "course of conduct" that artificially affected prices quoted by the subscribers. The Government's attitude with respect to the subject matter of this letter is indeed unique. There is nothing in the letter to indicate that it was in furtherance of a conspiracy to fix prices. That the Court, however, may have before it the entire transaction referred to in the Bureau's letter, the complete correspondence or reference thereto is quoted below:

9—6—19.

"From: Ankeney Linseed Mfg. Co., Des Moines, Iowa.

"To: Armstrong Bureau of Related Industries, Chicago.

"Subject: Price of Oil at Kansas City, Mo.

"Will you please bulletin Kellogg & Sons in reference to their price at Kansas City on August 27th, as stated by our Kansas City agents, as follows:

" 'The Swan Mfg. Co. are just in receipt of your invoice of 8-27, your No. 006465, covering 1 bbl. linseed oil delivered under date of 8-27, at which time Swan had a price from Abner Hood Chemical Co. of $2.13 per gallon. We told them that we could take care of them at the same price and our order was reported to you without notation to hold up billing until September. Will you kindly send them a corrected invoice on the basis of $2.13 per gallon?'

"We will hold making corrected invoice to this concern until we have report through you from the Kellogg Company.

"This seems to be similar to the Indianapolis case, where some of the crushers' agents were giving the trade the benefit of their September price a few days before its going into effect.

"Yours very truly,

"(Signed) H. E. ANKENEY,

(R. 475.)

"1. Although the Bureau has duly published your letter above referred to, Mr. Ankeney, the writer cannot help but take very great exception to the weakness of your sales policy as exemplified by that communication.

"2. You will see at once that if we permit our agents to meet our competitors' prices and back that policy with the support of our chief executives, as is evidently true in your proposed plan of procedure, we are just naturally taking the backbone out of our sales force and substituting a rubber composition.

"3. One of the very decided returns from this service is the development of individual thought and action giving to each manufacturer and merchandiser that all important accurate market information which enables him to place his own valuation on his merchandise and his merchandising ability, and that you will admit is ideal business.

"4. If on the other hand any subscriber to this service is using this market information as

an actual means, if not an actual incentive, to do as the other fellow is doing, then we are indeed failing in our purpose with that subscriber of instilling this all important principle, as I have stated.

"5. The great trouble today with American business and labor is that we lack independent thought and action, and we venture this letter, which we will also publish to the Council in the hope that you will fully subscribe to our views and will further support this principle by conveying this independent action idea not only to your Kansas City agent but to all those who represent you who may at once show this same disposition.

(Signed) "JULIAN ARMSTRONG."

(R. 476.)

"Buffalo, N. Y.,

"September 12, 1919.

"Armstrong Bureau of Related Industries,

"Chicago.

"Gentlemen:

"Relative to the inquiry of subscriber No. 2 regarding their Kansas City representative's report of quotations made by the representative of this company to the Swan Manufacturing Company prior to September 1:

It is quite evident that the individual talking for the Swan Mfg. Co. was correct in his claim that they have been quoted a price of $2.13 by the Abner Hood Chemical Company, our representatives, as he, like many other foxy buyers, referred to our quotation covering Sep-

tember delivery, and no doubt felt justified in using this price just so long as he refrained from mentioning the delivery involved in connection with the quotation. We have had a good many of our small customers who received invoices covering shipments and delivery of oil during the last few days of August use this same kind of an argument, but our answer to one and all alike has been that our price was in line with competition as it existed at the time; if the customer wanted oil for shipment or delivery during September, we would have been only too glad to give them the benefit of our September basis.

"The Kansas City representative of subscriber No. 2, being inexperienced in the handling of linseed oil, to say nothing of handling the buyers themselves, is, we think, a little ready to accept the statements of buyers as absolute facts, whereas experience has taught us that a large percentage of these same buyers do not hesitate to make statements that are misleading, yet being careful to refrain from making absolute falsehoods.

"Our records show most conclusively that we did not quote nor sell any oil for delivery from the Kansas City warehouses during the month of August at prices that would not conform to our price list as filed covering that month.

"Yours truly,

"(Signed) SPENCER KELLOGG AND SONS, INC.

(R. 477.)

Nothing could be plainer than that Armstrong was impressing upon the Ankeney Company the fact that each individual crusher should base his prices solely on individual action and not "do as the other fellow is doing." In other words, Armstrong was directly informing the Ankeney Company and the other subscribers that if the service of the Armstrong Bureau was being used to enable one to do as others were doing in the way of quoting prices, and that individual initiative was being eliminated, then the Bureau was "indeed failing" in the purpose for which the service was intended. That Armstrong was sincere in the position he took with reference to this transaction is amply supported by the record in this case and the opinion of the court below.

On page 42 of Government's brief reference is made to a report that a subscriber was offering oil with the price guaranteed against decline; that the Company replied that the report was true and that their agent, at Kansas City, had promptly issued a correction. The Government then states "of course, no member thereafter guaranteed against decline." We challenge this assertion, which is based on mere assumption. There is nothing in the record to show that the particular subscriber or any other subscriber thereafter did not guarantee against decline. It is a matter of

record, however, that these subscribers were free at all times to guarantee against decline or do anything else with respect to their individual business. The Bureau has stated this to the subscribers and evidence to this effect was submitted to the court below.

It is also a matter of record that the Bureau took the position that the practice of guaranteeing against decline was an unfair method of competition and so advised the subscribers. In this respect the Bureau was supported by the attitude of the Federal Trade Commission, which has issued several complaints against concerns, charging that the practice of guaranteeing against decline is an unfair method of competition in violation of Section 5 of the Federal Trade Commission Act. Can it be said that the announced attitude of the Bureau under such circumstances was also part of a plan to unlawfully restrain trade and commerce? Are we now living in an era when business men cannot come together and discuss, and even recommend the elimination of unfair trade practices without being condemned and prosecuted as conspirators to bring about an unlawful restraint of trade and commerce?

If a subscriber was adulterating linseed oil and selling it for pure linseed oil and some other subscriber should write the Bureau about it, and the

Bureau should write the offending subscriber and tell him such a practice was dishonest and an unfair method of competition, would the Government hold in that case that it was also part of an unlawful plan to restrain trade if the offender should write the Bureau that it had discontinued such a practice?

This whole case from the standpoint of the Government is based on suspicion and theory, wholly unsupported by the record.

On March 4, 1919 (R. 418), the American Linseed Oil Company wrote the Bureau requesting it to ascertain whether any subscriber had offered oil on consignment and that in consideration of storing it in their warehouse the purchaser could take it out on the basis of the consignee's carload price, having the oil invoiced to them on the dates they took it, enabling them to purchase the entire lot if they found the price was going to advance, or take it at such carload price as used. The letter was bulletined and replies received which show that the Midland Company had such an arrangement with a purchaser. The Government (page 87 of brief) in referring to this matter said:

> "However, it appeared from the reply of the Midland Company that it was the offending party, and its defense was that the American Company had an arrangement that was equally subject to criticism."

And again on the same page, it is stated

> "This is ånother illustration of how the details of every arrangement made by a subscriber was laid bare to the entire membership and how uniform action in every particular was secured."

The Midland Company did not reply "that it was the offending party" nor is there anything in the record to indicate that the Midland Company felt that its action in this matter was offensive to anyone. Further, it did not in its reply state "that the American Company had an arrangement that was equally subject to criticism." In fact, the Midland Company in its reply specifically stated that "we do not mention this matter as a complaint." There is nothing in the inquiry and replies thereto with respect to this transaction that supports the statement of the Government that "this is another illustration of how the details of every arrangement made by a subscriber was laid bare to the entire membership, and how uniform action in every particular was secured." There is nothing in the record to show that either the Midland Company or the American Company discontinued the arrangements referred to in the correspondence transmitted through the Bureau. The reply of the Midland Company is quoted below:

"Midland Linseed Products Co. (3-7-19.) (R. 430.)

"We have for many months had an agency contract with the Hansen Paint & Glass Co., of Sioux City, Iowa. Without doubt, under this contract, the Hansen Paint & Glass Co. are entitled to receive linseed oil in carload lots and obtain from us our carload price. No doubt the Hansen Paint & Glass Co. would like to persuade the American Linseed Company to deliver linseed oil to them from their Sioux City plant at their carload price, as in this way they would avoid drayage, receiving and storage expenses, and the payment for linseed oil lost by leakage, which they are obliged to stand under their contract with us.

"We do not understand why Subscriber No. 1 should complain because we sell one of our agents linseed oil, this agency being of long standing, under the conditions named. We note that you recently reported that Subscriber No. 1 had made a new agency contract a few days ago with Hibbard, Spencer, Bartlett & Co., of Chicago, one of the largest distributers in the country. Under this contract Subscriber No. 1 delivers linseed oil by team at an expense of 3c. per gallon and gives the Hibbard, Spencer, Bartlett Co. a commission of $1.00 per barrel. This, in fact, is not a commission but a rebate in price, as Hibbard, Spencer, Bartlett & Co. perform no service whatever for this $1.00 per barrel, but derive

their profit from the sale of this linseed oil to the country trade at prices 10c or 15c. per gallon above the warehouse price of Subscriber No. 1.

"It is evident that this agency contract excludes this company from the business of one of the largest distributers in the United States. We do not mention this matter as a complaint, but we hope that Subscriber No. 1 will view our long-established relations with the Hansen Paint & Glass Co. in the same cooperative spirit that we view theirs with Hibbard, Spencer, Bartlett & Co."

The Government is evidently laboring under the misapprehension that the clearance of these letters was for the purpose of checking or preventing subscribers from making sales or quotations except at their last filed price list.

The clearance by the Bureau of such letters was solely for the purpose of ascertaining whether a subscriber had put out a new price list or had made sales or quotations which he had not duly reported to the Bureau as required under the service contract, or whether or not buyers were circulating false reports as to quotations made by other subscribers for the purpose of battering down the quotations made by crushers. In other words, the letters show a sincere manifestation that the Bureau and its clients were equally interested at all times in checking the accuracy, thoroughness

and completeness of market information going through the Bureau.

The major portion of the Linseed Oil business is done through agents and brokers who derive their return not on a percentage of the price they obtain for the oil, but at a rate of so many cents per gallon sold irrespective of the price at which the oil changes hands.

Obviously, the disposition of such agents and brokers is to make the sale with no particular regard for the actual selling price of the oil, and quite frequently they allow themselves to be influenced by the price at which some buyer has told them oil is being sold.

On this basis they are working more in interest of the buyer than of the crusher. Again, assuming a crusher quotes a special price to a favored buyer and fails to report it promptly as required under the service contract. Another subscriber may hear of this transaction through his agents and being unable to check the accuracy of the information through the reports of the Bureau then in hand may inquire of the Bureau whether or not such a quotation or sale has been made, and if so, by whom. When this inquiry is received by the Bureau, it of course bulletins all the subscribers asking first if anyone has made the quotation or sale referred to and if so, why the same was not reported to the Bureau. There is

nothing, however, in any of the defendants' letters or testimony referred to by the Government that indicates that any attempt was made by any one connected with the Bureau or the subscribers to prevent a member charging any price, or changing his price list whenever he wished. We cannot impress this too firmly upon the court for the reason that all through the Government's brief it is continually referring to prices and alleging that they were artificially enhanced, fixed or affected by the Bureau's service with the linseed oil crushers.

LEGAL EXCEPTION FILE

Shortly before the beginning of operations of the Linseed Oil Council through the Bureau, Mr. Armstrong in a letter dated September 20, 1918, advised each subscriber:

"IMPORTANT POINTS OF THE SERVICE TO KEEP UPPERMOST IN YOUR MIND

"I. Never advise the bureau what you intend to do, as the bureau can clear information only on action that has already taken place. To make this point clear do not send to the bureau a statement such as 'We enclose herewith price lists which will become effective next week.' When you file information with the bureau covering any of your quotations to your trade, such information can only be filed

immediately after such action has taken place and the form for reporting such information is," "We hand you herewith prices which we have today quoted our trade."

"2. It is important to give immediate reply to all inquiries from the bureau, for you must bear in mind the fact that the bureau's compilation report must await receipt of a reply from each subscriber; therefore, any delay on your part penalizes everyone. Bearing on the above, do not feel that because you have made no quotation or sale on a particular transaction it is not necessary for you to reply to the bureau's inquiry asking for such information. You must reply to any and all such inquiries, giving information covering your quotation or sale and, if such quotation or sale has not been made by you, then you must so state.

"3. Remember also that there are no restrictions implied, understood, or agreed upon by which you are bound at any time to quote any prices other than those which your judgment prompts you to make. The bureau's service will keep you advised at all times of the prices quoted or the prevailing market, and it is up to you to undersell or oversell these prices according to your best judgment, but under the terms of the contract you must keep the bureau advised of any deviations from your last-reported quotations.

"4. When the service is well under way and you are receiving quotations representing the

prevailing market prices for linseed oil, cake, or meal, do not make the mistake of referring to the market as 'the price, for, although such a reference would be understood in its proper interpretation by the bureau and your fellow subscribers, it nevertheless savors of a uniform or an agreed price, or might be so construed. Therefore the bureau will not handle any communication making such references. You may refer to the prevailing market prices if necessary, but it is much better to confine your reference to 'our prices' and 'their prices' in every instance.

"5. It is well to remember that in requesting special market information as provided on line No. 349, you must in each case supply the bureau with the specific quotation which you have made, irrespective of whether or not it is in accord with your last-filed price list. In other words, you cannot state that you 'have quoted in accordance with' your last-filed price list but must, under the circumstances, give the specific information covering all the details of your quotation, which, however, will be handled as provided in the contract.

"6. Do not hesitate to call on the bureau for specific explanation of any points covering this service, as the fullest possible benefits can only obtain from a thorough and complete knowledge of the provisions and obligations of this contract." (R. 335.)

The Government in its brief, page 118, states that the above was a suggestion from the Bureau. We assert, however, that it was not "a suggestion," but a direct affirmative statement of the Bureau as to what it unqualifiedly required of the subscribers with respect to references to prices quoted by the various subscribers. Despite the positive attitude of the Bureau, however, it received from time to time communications from the subscribers to be bulletined to other subscribers which contained expressions which it was thought might create a false impression of the activities of the Bureau in connection with its service to its members. That the Bureau was correct in such assumption is now forcibly demonstrated by the statements contained in the Government's brief with respect to such communications.

In order that the position of the Bureau should at all times be clearly set forth to its members and in order to protect itself as best it could against such expressions, it took the only course open to it, and that was to return such communications with a letter setting forth the exact functions of the Bureau, calling attention of the subscribers to just what the Bureau considered was entirely outside of the Bureau's activities, with the further statement that the Bureau could not under its contract bulletin communications with such objectionable statements contained therein. The record

shows that the objectionable communications were never bulletined to subscribers for the reason set forth in each instance. Government Exhibit 12 (R. 607-623) contained many of these communications termed "legal exceptions" and the Court is respectfully requested to scrutinize them carefully. That the Court, may, moreover, get some idea as to what these communications contained, and the position of the Bureau with respect thereto, a few are specifically referred to below:

F. K. Quine, Sales Manager of the American Linseed Company, on July 10, 1919, wrote the Bureau in part as follows:

* * * * * *

"We realize that very often report of sales is delayed, and it might often happen that we and other crushers might have to report sales the next day after we had made a change in the price, this due to many stations throughout the country who have to make their reports by telegraph or mail after the receipt of reports from consignment accounts in their territory.

"We think, however, that the Archer-Daniels Company, in reporting the sale of 100,000 gallons of bulk oil on July 8th, sale having been made on July 2d, needs some special explanation, particularly as the sale was made at 2 cents under their published price.

"So far as our records go, their price on July 2d was $1.85 in car lots, cooperage, zone

No. 3; a 5 cent differential between barrels and bulk would make their published price $1.80. We wish you would bulletin them, with a view to explaining why they did not reduce their price throughout the country as per contract, and ask also if we are not entitled to some definite explanation of this way of doing business. Had the sale been reported on July 3d, the next day after having been made, there could have been no particular objection made with respect to the delay. There should, however, have been made some explanation of the price. They do not even speak of its having been a sale at a special price." (R. 608.)

* * * * * *

This letter was returned by the Bureau on July 12, 1919, with a letter which reads in part as follows:

* * * * * *

"3. To go back to your letter: You refer in the first paragraph to a 'change in the price,' whereas you no doubt intended to say 'change in our price.'

"4. Also in the last paragraph you refer to the subscriber in question having failed to reduce his price throughout the country 'as per contract.' While we agree with you that his action was unbusinesslike, in view of his support of the recommendation unanimously passed in this regard, there is no agreement or mention in the contract of such procedure." (R. 609.)

* * * * * *

The Government referring to this particular correspondence in its brief (p. 119) states that "as a matter of fact a positive understanding and agreement had been made between the members of the bureau dividing the country into zones and requiring that the price in each zone be composed of the price in zone 1 plus the differentials." That the subscribers were not required to do any such thing is set forth from an excerpt of the minutes of the meeting of January 23, 1919, which reads as follows:

> "NOTE: The Council members are advised by the bureau that while their answer to the above question is to be accepted as a system of their present basis of making their respective quotations, and clearing same through the Bureau, there are no restrictions whatsoever in making any changes that they may see fit to make in such policy, excepting, of course, that they shall at once advise the Bureau fully and completely when such changes have been made." (R. 381.)

On September 29, 1919, Mr. Quine of the American Linseed Company wrote the Bureau:

> "We have not quoted nor sold Schnaible Drug Company, Lafayette, Indiana, September delivery of oil at the October price. (R. 612.)

This was returned with a statement by the Bureau, that "if you mean your October price please so state." (R. 612.)

On October 3, 1919, the Ankeney Company wrote the Bureau "we very often put in a change of our price without having quoted the trade, but this change in our price is relayed the same as a quotation." This letter was returned by the Bureau on October 12, 1919, with a letter stating:

> "SUBJECT: Your letter of the 3d attached hereto; taking legal exception to your evident misunderstanding of the service contract.
>
> "1. In the final paragraph of your communication above referred to, Mr. Ankeney, it is evident that you have completely overlooked the fact that this Bureau clears only information on past transactions, and therefore it would be unlawful for you to advise the Bureau of any changes in your prices which you have not actually quoted to your trade.
>
> "2. It is not permissible for you to change your price list and so advise the bureau unless that constitutes a bona fide change in your prices, and that means those prices must be actually quoted.
>
> "3. Kindly advise us by return mail that you now thoroughly understand this point, and will be guided accordingly, rewriting the letter attached to conform with the provisions of the service contract and the spirit of the service." (613-14.)

It is apparent from the above reply to the Ankeney Company's letter that the Bureau was ever watchful to see that a subscriber was not violating its service contract with the Bureau and using the machinery of the Bureau in conflict with the terms of the contract. It did not hesitate to inform the Ankeney Company that if it were reporting to the Bureau changes in its prices on oil that did not represent bonafide quotations already made to its trade, the Bureau would not clear such information for the reason that the contract with the Ankeney Company clearly provided that such information could not be cleared by the Bureau until after the manufacturer had advised the trade of such change in his price.

The Government, however, says in its brief on page 121, "that to consider such a distinction as material shows the absurdity of the Bureau's contention." We venture to state, however, that the Government would not have passed this matter by so lightly if the reply from the Armstrong Bureau to the Ankeney Company had stated that such a practice was all right and letter would be bulletined to the other subscribers.

Several letters were forwarded to the Bureau by subscribers stating that "the above sale was made on quotations sent out before the advance," and the Bureau returned such communications

with the statement that if the subscriber was referring to his particular "advance" he should so state. Some of these communications referred to "the price" or "the carload price" or "the published price of oil f. o. b. warehouse." These letters were in every instance returned to the writers by the Bureau for "legal exception" to such expressions, with the statement that if the writers were referring to "their price" the communications should so state. In other words, the Bureau never considered that there was such a thing as "a price" or "a carload price," or a "published price of oil f. o. b. warehouse." While it knew that the subscribers also recognized the fact, the Bureau continued to hammer home to its members the provisions of the service contract and strove to avoid being misunderstood as to its activities, as it is now being misunderstood by the Government in its brief.

It seems inconceivable in view of the entire record in this case that any one, especially the Government, who had the defendants before it in the lower court for intensive cross-examination, could believe or assert, that these "legal exceptions" letters were not written by the Bureau with the honesty of purpose set forth therein.

An examination of the record and these letters will show that they ranged over the entire period

of the operations of the Linseed Oil Council, and in every instance the Bureau was quick to correct the subscribers as to the sincere meaning and purpose of the service contract.

Is it not strange that out of the whole mass of correspondence taken from the Bureau's files and offered in evidence by the Government there is not a single line indicating that these "legal exception" letters were a sham or that the subscribers were unconsciously stating the truth that there was such a thing understood among them as "the price"? Is it not enough to say there is no foundation for the statements of the Government in its brief "that these subscribers really understood that they were by common agreement maintaining prices and observing practices" when we quote below the statement of the Judge in the lower Court:

> "Now, there certainly can be no real point in this case with reference to this acting in the future or in the past, because so far as the contract of the parties is concerned it had to do with the past alone, and that has not been disputed. Everything that has to do with the future is a matter of possibility, and that you are now attempting to reach by way of deduction from the evidence; but we have no evidence that these men agreed to do something in the future." (P. 871, Record Lower Court.)

to which Counsel for the Government replied:

> Mr. Mitchell: "Oh, yes, your Honor. We have no evidence that they agreed to adhere to uniform prices in the future. I make no suggestions of that kind, but the fact is that they entered into a contract—take the contract itself." (Ibid.)

* * * * * *

As further establishing the fact that there never was such a thing as "the price" (meaning agreed price) understood by the Bureau or the subscribers is shown from the prices quoted by the crushers, particularly on the date referred to in several of the communications mentioned in the Government brief. For instance on May 17, 1919, mentioned in Government's brief at page 118, four crushers were quoting $1.56 per gallon and eight were quoting $1.54 per gallon; on July 8, 1919, referred to in Government's brief at page 119, nine were quoting $2.10 per gallon, one was quoting $2.03, two were quoting $2.00 and one was quoting $1.93.

As further showing that there was no inflexible rule or agrement as to differentials, the following correspondence between the American Linseed Oil Company and the Bureau is quoted below:

"American Linseed Company
"New York, January 15th, 1920.
"Armstrong Bureau of Related Industries,
"11 So. La Salle Street, Chicago, Ill.
"Dear Sir:

"On May 7th, 1919, we asked you to advise subscribers that we were maintaining a differential of 3 cents per gallon in zone No. 3 for oil in quantities of less than 5 barrel lots over our warehouse price; in other words, our warehouse price has been 3 cents over our carload price and this filing represented a price of 3 cents a gallon of lots less than 5 barrels.

"We find that the only subscriber, according to our records who also filed a similar price, was the National Lead Company, and we now want to notify the subscribers that we have rescinded this particular action.

"Yours very truly,
(Signed) F. K. QUINE,
"Manager Oil Sales Dept."

"American Linseed Company, Mr. F. K. Quine,
"C. Rosenfels,
"Your letter of January 15th.

"1. We are going to ask you to be a little more explicit in your letter withdrawing your differential of 3 cents per gallon in zone 3 because, while it may be inferred that you are reinstating your former differential of 2 cents over your warehouse price, you do not so state in your letter, and in matters of this kind it is important, of course, to have an absolutely clear understanding.

"2. We would also suggest that you omit your reference to the action of other subscribers in this matter, stating merely that you have rescinded your action and giving your differential as it stands at the present time."

C. R.: E.

"American Linseed Company,
"New York, January 22, 1920.

"Armstrong Bureau of Related Industries,
"11 S. La Salle Street, Chicago, Illinois.

"Dear Sirs:

"We have withdrawn our filed differential of 3 cents over the warehouse price on linseed oil in lots of from 1 to 4 barrels at New York. This does not mean that we are reinstating our former diffential of 2 cents.

"We think it fair and right to say that we are withdrawing our differential as a matter of record only, as we have determined that if it was considered by us proper to do so in this market it would also be proper for us to file our price on one to four barrel lots at all other distributing points.

"Yours very truly,

(Signed) F. K. QUINE,

"Manager, Oil Sales Dept."

"January 24, 1920.

"From: Julian Armstrong, Armstrong Bureau of Related Industries,

"To: Mr. F. K. Quine, American Linseed Company, Woolworth Bldg., New York City.

"SUBJECT: The letter attached—a legal exception.

"1. In commenting on your letter above referred to, Mr. Quine, I do not wish to be rude and rough, nor vulgar, but just what did you mean to tell us you have done?

"2. Sometimes I think you folks who live above the twenty-fifth floor get too much ozone in your system and you try to take us 'earthy' folks up in the air with you.

"3. This is to advise we 'ain't' with you. Rewrite please.

JA:Q (Record 621-622-623.)

SPOT QUOTATIONS

The Government in its brief devotes much of its effort toward impressing the Court with the importance of uniformity in prices quoted at intervals by the crushers and seeks to show by such quotations that an unlawful combination or conspiracy resulted.

But what do these figures really prove? They prove that at certain periods market prices of linseed oil for spot or immediate delivery remained stationary for some time, and then moved; that sometimes all the crushers were selling at the same price, and sometimes they were not. That is all. There is no evidence in the record that the behavior of linseed oil prices was in any essential respect different, during the period covered by

these exhibits, from what it was before the Armstrong Bureau became a factor in the linseed oil industry.

The Linseed Oil Council was in operation from October 1, 1918, to June 30, 1920, a period of one year and nine months. During this time there were infrequent periods of uniformity in price. However, an examination of defendants' exhibit "2" (R. 681) shows that periods of uniformity in price have been common in the linseed oil industry for thirty-two years. Unfortunately no evidence has been presented in this case because none is available, showing linseed oil price fluctuations before October, 1918, in any such detail as do exhibits referred to for the period October 1, 1918, to June 30, 1920. It is therefore difficult to compare the behavior of linseed oil prices before and during the period of the Armstrong Bureau's activities. However, some such comparisons are possible by the use of Defendant's Exhibit No. 2 (R. 681) showing low and high monthly competitive prices for oil over a period of 32 years. This exhibit shows that in every year from 1889 to the end of 1914 with the exception of 1906 and 1910, there were monthly periods of uniformity in price or monthly periods in which there was only a spread of one cent per gallon in linseed oil, clearly demonstrating, we assert, that periods of uniformity or approximate uniformity in price were not uncom-

mon for many years prior to the organization and operation of the Linseed Oil Council through the Armstrong Bureau.

The Government, however, points an accusing finger at each of the uniform periods from October, 1918, to June 30, 1920, the longest of which lasted two months and three days. As revealed by Defendant's Exhibit No. 2, during the 29 years, 1889 to 1917 inclusive, periods of constant prices occurred as follows:

27 periods of at least 1 month's duration.
12 periods of at least 2 months' duration.
3 periods of at least 3 months' duration.
1 period of at least 4 months' duration.
1 period of at least 5 months' duration.

According to the same record, in the 27.75 years, beginning with January 1, 1889, and ending with September 30, 1918, there were 135 calendar months during which the price of oil did not vary more than one cent per gallon, while in the 1.75 years from October 1, 1918, to June 30, 1920, inclusive, there were 7 such months. From this it follows that within the period of the Armstrong Bureau's operation there was an average of 4 months per year during which oil prices varied not more than one cent, while in the previous 27 years there were on an average 4.86 such months. Evidently if periods of nearly stationary prices are

an evidence of iniquity, the Government's finger of scorn is pointing the wrong way.

Government's Exhibit 3 (R. 184) not only shows the periods of uniformity, but also shows the frequently occurring periods in which there was a constant spread in competitive prices quoted by the crushers at the same time as is shown by the following:

> "October 1, 1918, to January 16, 1919, a spread in price of from 4 to 27 cents per gallon.
>
> "March 5, 1919, a spread of 5 cents per gallon.
>
> "April 9, 1919, a spread of 3 cents per gallon.
>
> "April 23 to April 26, a spread of 5 cents per gallon.
>
> "April 30 to June 24, 1919, a spread in price of from 2 to 19 cents per gallon.
>
> "June 28 to July 14, 1919, a spread in price of from 7 to 17 cents per gallon.
>
> "July 24 to July 31, 1919, a spread in price of 5 cents per gallon.
>
> "August 28 to September 30, 1919, a spread in price from 1 cent to 11 cents per gallon.
>
> "October 6 to 16, 1919, a spread in price of from 10 to 14 cents per gallon.
>
> "November 22 to November 26, 1919, a spread in price of five cents per gallon.
>
> "December 1 to December 10, 1919, a spread in price of 10 cents per gallon.

"March 2, 1920, to March 10, 1920, a spread in price of from 2 to 7 cents per gallon.

"March 18, 1920, a spread of 5 cents per gallon.

"March 26 to April 2, a spread in price of 10 cents per gallon.

"April 16 to June 28, 1920, a spread in price of from 3 to 14 cents per gallon."

The Court's attention is directed to the fact as shown by Government Exhibit 3 that in the three exceptional instances covering uniform prices, the first period, February 17 to March 4, 1919, the uniformity in price occurred after a drop from $1.48 per gallon to $1.43 per gallon, and in October, 1919, from $1.80 per gallon to $1.70 per gallon, and in the latter part of December, 1919, and January and February, 1920, uniformity in price occurred after a drop from $1.85 to $1.75 per gallon.

This is called to the Court's attention because it is fair to assume that if the subscribers had entered into a conspiracy or combination to enhance or fix prices they would not have brought about a uniformity at lower prices than had been quoted and received for linseed oil just prior to such periods. An examination of the prices quoted by the crushers just prior to these periods of uniformity will disclose that several of the crushers had begun to quote a price of from five to ten cents per

gallon below the prices quoted by the other subscribers, and it is only fair reasoning to assume that the others were put in the position of having to meet the reduced prices or face the alternative of having oil to sell and be unable to make sales for the reason that buyers would not pay their higher prices when the trade was being quoted a lower price. The uniformity in prices therefore, we assert, obviously resulted from competition and not from combination.

Defendants' Exhibit 2 ("32 Years of Linseed Oil Prices"), (R. 681) shows that on or about July, 1916, the price of linseed oil was about 62 cents per gallon; that from that time on until the operations of the Linseed Oil Council, beginning October 1, 1918, the price had steadily advanced to or about $1.92 per gallon, an increase in price of approximately 209%; that thereafter, with the exception of the high prices of oil in the months of July, August, and September, 1920, which rise in price was due solely to the exceptional rise in the price of flaxseed (as admitted by Counsel for the Government in his argument in the lower Court), the prices quoted by the defendant crushers never were in excess of $1.92 per gallon, ranging from $1.53 per gallon the latter part of December, 1918, to $1.43 per gallon January 16, 1919; $1.48 to $2.25 per gallon from January 17 to July 19, 1919; and then declined to approxi-

mately $1.58 per gallon in June, 1920. These declining prices occurring at a time when the prices of practically all commodities were steadily advancing, ought to be convincing to this Court that the defendant crushers had not entered into any combination for the *purpose*, nor to *effect* an enhancement, or to fix or retard the lowering of prices of linseed oil by any artificial means, but that they at all times, individually, and without any obligation to one another, quoted such prices for linseed oil as in their best judgment the market conditions warranted.

We would further call the attention of this Court to the fact that the entire record does not disclose a single instance where false or misleading quotations were sent to the Bureau or distributed by it among the defendant crushers or the trade to in any way artificially affect prices; that there were never any communications either from or to the Bureau intimating that decreased production of flaxseed or high prices therefor should bring about increased prices for linseed oil; the record does not disclose a single instance where there was any discussion that decreased production would be of benefit to the crushers, but the record does show that manufacturers were at all times seeking full information as to the condition of the flxseed crop in America and when it became known that the crop was a failure in 1919, they immediately began buying and

shipping flaxseed to this country from Argentine at prices never before paid in the history of the industry.

Further, the testimony of the witnesses called by the Government and the defendants is clear on the point that the rise and fall in the prices of linseed oil during the operations of the Armstrong Bureau were to a very large extent regulated by the price of flaxseed.

The files of the Bureau and of at least one crusher were honeycombed by agents of the Government and responsible executive representatives of every crusher defendant were cross-examined by counsel of the Government in the lower court. There is no evidence in the record, oral or written, that when the prices of lineed oil took a sudden jump or a sudden drop there had been prior thereto a meeting of the Council nor that any correspondence relative to the bringing about of such a rise or fall had been bulletined through the Bureau. If these uniform periods or sudden jumps or sudden drops in prices were brought about by concerted action on the part of the Bureau and the subscribers where is the proof in the record to show it? Judge Carpenter at the very beginning of the case in the lower court told counsel for the Government that "uniformity is unimportant in this case. It is concerted action that we are interested in." (Page 36 of record in lower court.)

And at the close of the argument Counsel Mitchell, for the Government, admitted (page 871 of record in lower court) "we have no evidence that they agreed to uniform prices in the future, we make no suggestion of that kind," and he was speaking the truth as the record now before this Court clearly shows. Mr. Mitchell personally spent two weeks in the Bureau's office looking for just such evidence.

The Government calls the court's special attention to what occurred on October 1, 1919, namely that every member's spot quotation dropped either 25 or 26 cents to a uniform figure of $1.84, which remained in effect until November 22. However, the Government does not call special attention to the fact that it was only spot quotations which showed this "suspicious" uniformity. On October 2nd, the day after this drop, the spread between the high and low of members' quotations, although it was zero for immediate delivery, was nine cents for November delivery, 17 cents for December delivery and from 11 to 17 cents for delivery in all subsequent months to June, 1920. During the week in which October 1st occurred, members sold for spot delivery 50,112 gallons, and for future delivery 596,400 gallons, so that the Government's excitement, in this instance, is stirred by prices affecting only about one-thirteenth of the sales.

An examination of Government's Exhibit No. 6 ("Comparison of Flaxseed Market Prices, Linseed Oil Market Prices and Linseed Oil Replacement Costs") * will show why there was the sudden drop of 26c. per gallon in the price of linseed oil on October 1, 1919, and a further drop of ten cents per gallon on January 1, 1920. The chart shows that these sudden drops were caused by flaxseed taking a rapid decline on or about these dates, and we assert that this chart is the answer, and the only answer, to the statement of the Government appearing on page 127 of its brief that "it was a most remarkable economic phenomenon if there was no understanding between the producers." It is apparent to any one that with the flaxseed market falling as it did in these two instances no "understanding" as to a revision downward of linseed oil prices was necessary. No other course was open to the crushers regardless of their desires in view of the fact as testified to by the several buyers called by the Government that they watched the flaxseed market and their commitments were largely based thereon. We respectfully request this court to examine this chart (Government Exhibit 6), to see for itself how closely the prices

*This is not in the printed record but is in the final record and photostat copies are submitted herewith.

quoted by the crushers followed the rise and fall of the flaxseed market.

The top line of the chart indicates the rise and fall of the flaxseed market. It is at once seen what a feverish market it is. The next line indicates the average of the prices quoted by the crushers. The last line indicates the cost of replacing linseed oil. It will be seen from this last line that very often during the period from June, 1919, to January, 1920, the cost of replacement was greater than prices quoted by the various crushers. We assert that this strongly indicates that there was no combination or conspiracy to artificially affect prices to the trade.

Furthermore, Government Exhibit 6 (Chart, photostat copy submitted herewith) indicates why there was a sudden drop of 26c. per gallon in the price of linseed oil on or about October 1, 1919. During the month of July, 1919, the price of flaxseed was approximately $6.20 per bushel. On or about October 1, 1919, it had dropped to approximately $3.80 per bushel. In fact, from about September 8 to October 2, there was a decline in the price of flaxseed from approximately $5.40 to $3.80 a bushel. Thereafter the price of flaxseed rose until it finally went over $5.00 a bushel.

In referring to the drop of ten cents on January 1, 1920, which continued until March 4, the Government at page 127 of its brief states:

> "At that time the Bureau was under investtigation; and because of that fact or for some other reason quotations were much more varied than at any other time except probably when prices were moving up towards peak of August."

This statement, to say the least, is unique. "Quotations were much more varied" for this or that reason, says the Government, and if true, what is the significance? Government Exhibit 3, however, shows that these quotations did not vary any more than quotations for other periods, and so far as the "investigation" affecting quotations, Government Exhibit 3 shows that after March 4, quotations began to rise from $1.75 per gallon on that date to as high as $1.87 on March 18, and did not again reach the price of $1.75 until some time in the latter part of April. This rise, however, is not well explained by an indefinite statement such as "for one reason or another;" quotations were getting higher and higher, but is explained by Government Exhibit 6 (Chart), which shows that on or about March 4, 1920, flaxseed was selling around $5.00 per bushel and thereafter advanced sharply to approximately $5.35 per bushel. Thereafter it will be seen from the chart the price of flaxseed declined, and consequently the price of linseed oil declined as shown by Government Exhibit No. 3.

STATIONARY PERIODS IN SPOT QUOTATIONS

Government Exhibit 7 (a photostat copy submitted herewith) is a chart entitled "Linseed Oil Industry Inactive Market Periods, Oct. 1, 1918, to June 30, 1920." This chart covers what are known in the trade as "Inactive Periods" but referred to in Government's brief as "Uniform Periods." On the lower right hand side of this chart appear the initials "J. F. T.," which are the initials of James F. Terry, Special Agent of the Bureau of Investigation of the Department of Justice, who testified that he went to the offices of the Armstrong Bureau for the purpose of making an examination of their records, that he was given access to their records and checked up certain tables which had been prepared; that he verified the accuracy of these tables by their records. (R. 50.) There can be no question therefore as to the accuracy of the data set forth in Government's Exhibit 7. It should be borne in mind, however, that this analysis covers only "spot" oil—approximately 20% of the total transactions in linseed oil.

The first inactive or uniform period appearing on said table was from February 17 to March 4, inclusive, and shows 75% of the sellers active in the market. The market price quoted was $1.43. There appear two broad lines on said chart for each inactive period, the top line in each instance representing the total sales of spot oil for that par-

ticular period and the lower broad line representing the normal sales for such period. In the first inactive period now under discussion the top broad line shows that less than one-half of normal business for the period mentioned was transacted.

The next inactive period, March 6 to April 8th, inclusive, shows 66 2-3% of the sellers active in the market at a price of $1.48. The first broad line below shows less than one-quarter of average normal business was transacted during this period.

The next inactive or uniform period was April 10 to 22, inclusive, and shows but 50% of the sellers active in the market at a price of $1.51. The first broad line shows that the amount of business transacted during this period as compared to the normal business was negligible.

The next inactive or uniform period was April 28 to April 29, inclusive, at a price of $1.56, and shows that no sales were made during that period.

The next inactive or uniform period was June 26 to June 27, and shows 15.3% sellers active in the market at a price of $1.86, and the first broad line below shows that the amount of sales were insignificant.

The next inactive or uniform period was July 15 to July 23, inclusive, and shows 33¼% of sellers active in the market at a price of $2.15. The first broad line below shows that less than one-tenth of the normal business was transacted.

The next inactive or uniform period was August 1 to August 27th, inclusive, and shows only 61.5% sellers active in the market at a price of $2.20. The first line below shows a negligible quantity of oil was sold as compared with the normal sales for this period.

The next inactive or uniform period is October 1 to October 5, inclusive, and shows 38.5% sellers active in the market at a price of $1.84. The first line below shows that the sales during this period were negligible.

The next inactive or uniform period was October 17 to November 21, inclusive, and shows 69.2% sellers active in the market at a price of $1.70. The first line below shows that only approximately one-sixth of the normal business was transacted during this period.

The next inactive or uniform period was November 28 to November 30, inclusive, and shows that 23% sellers were active in the market at price of $1.75. The first line below shows that the actual oil sold was negligible.

The next inactive or uniform period was December 11 to 31st, inclusive, and shows 23% sellers active in the market at a price of $1.85. The first line below shows that a negligible quantity of oil was sold during this period.

The next inactive or uniform period was January 1 to March 3, 1920, and shows 69.2% sellers

active in the market at a price of $1.75. The first line below shows that a very insignificant amount of oil was sold during this period.

The next inactive or uniform period was March 7 to March 15th, inclusive, and shows 16 2-3% of sellers active in the market at a price of $1.82. The first line below shows that a comparatively small amount of oil was sold during this period.

The next inactive or uniform period was March 25th at a price of $1.82, and shows that no sales were made on that date.

The next inactive or uniform period was April 6 to 15th, 1920, and shows 18% sellers active in the market at a price of $1.82. The first line below shows that very little oil was sold.

Government Exhibit 3 (R. 184) shows that in many cases the inactive or uniform periods came after a decline in price. For instance, the inactive or uniform period of February 17 to March 4, inclusive, came after a decline in price. The inactive or uniform period of October 1 to October 5, inclusive, came after a decline in price, the inactive or uniform period of October 7 to November 21, came after a decline in price, and the inactive or uniform period of January 1 to March 3, came after a decline in price.

In view of these facts and the further fact that Government Exhibit No. 7 shows on its face that the sales of oil during these inactive or uniform

periods were greatly below the normal amount of sales for such periods, it is fair to assume that the defendant crushers had not "cashed in" by reason of any combination or conspiracy to bring about uniform prices. When this chart showing inactive or uniform periods is compared with defendants' Exhibit 2 (R. 681) it will be at once apparent to this Court that such inactive periods were not uncommon to the linseed oil industry over a period of thirty years. Further, the record does not disclose a single statement, oral or written, that tends to show that the Bureau or its members by any concert of action, direct or implied, brought about or encouraged, or even suggested uniformity in the price during the periods set forth in the chart marked Government's Exhibit No. 7. It would indeed be a strange phenomenon if individuals could bring about by concert of action, direct or implied, such periods of uniformity in price without there being a single line written by some one with respect thereto or a single discussion in connection therewith; the record shows that Mr. Terry, the investigator for the Government, made a thorough examination of the statistical data prepared by the Bureau and submitted by the Government in evidence in this case, and it is also a matter of common knowledge that Henry S. Mitchell, Counsel for the Government in the proceedings in the lower court, spent considerable

time in the Bureau examining all of its files and data. There is not a single fact in the entire record which in any way suggests that the Bureau or its subscribers in the Linseed Oil Council brought about the inactive or uniform periods referred to in this case. We contend that such periods have been occurring in the industry for the past thirty years and are caused by the fact that oil is not moving to the trade at those times as in normal periods of demand. In fact, the chart itself shows that never during these inactive periods were there 100% of the sellers in the market. Surely the members would not conspire to bring about a fixation of prices if they did not feel that they were going to participate in the results to be obtained therefrom.

FUTURES

It is a curious fact that the Government's discussion of prices is in most parts of the brief confined to spot quotations, which represent on the average only one-fifth of the total business, and at certain times of the year very much less than one-fifth. It is true that in the section under discussion several pages (beginning on page 128) purport to be devoted to a consideration of future quotations. However, even here the Government limits itself in a most extraordinary manner, as shown in the two following excerpts: "Quotations in any one month for delivery in future

months were usually the same or very nearly so upon the same dates, except during the immediately preceding months." "We will, therefore, call attention only to the quotations during the immediately preceding month, and the latter part of the month previous thereto, as to go further back would be but a repetition."

Now the fact is that the great bulk of future sales are made for delivery period four to six months ahead, so that when the Government attempts a discussion of futures by the proceeding it has adopted it voluntarily cuts itself off from any consideration of prices affecting the majority of important transactions, in fact it is doubtful if it reaches more than one-fifth of the business in "future oil." In this section of the brief are eight italicised portions, each of them evidently so emphasized for the purpose of calling attention to the uniformity which the Government regards as so obnoxious. Each of them relates to "future" quotations for a time so near at hand that they are virtually spot quotations. Only very small quantities of oil were sold under them.

Government Exhibit 4 (R. 210) deals with quotations on oil for future delivery. What has been said in this brief with respect to how spot quotations are made applies likewise to future quotations, that is to say, future quotations by the subscribers are based solely on the individual's free-

dom of action in quoting for future delivery such prices as he thinks advisable under the circumstances. The Government in its brief, however, is continuously dealing in generalities and statements which if qualified by the facts as presented in the record would show an entirely different situation. For instance, on page 129 of the Government's brief, the statement is made "that all quotations submitted for first seven days of October were $1.71." The record, however, shows that only six members reported quotations on October 1, 2, 3, 7 at $1.71 for November delivery, one reported on October 2 a price of $1.68 for December delivery; three reported the same on October 2nd; four reported the same on October 3 and 4 and one reported a price of $1.67 on October 4, and five reported a price of $1.68 on October 7, all for December delivery. Throughout its brief the Government is continuously digressing from the record and making statements not supported by facts. On page 129 of its brief the Government in referring to uniformity in price beginning November 26, states that "By this means the system had begun to properly function," meaning that the Armstrong system was intended to and did bring about uniform prices. In the very next paragraph, however, on page 130 of its brief, the Government states that two members changed their price from $1.53 to $1.48 on January 14, and on January 15,

ten members dropped to $1.43; five reducing first to $1.48 and at a later hour, to $1.43. There is no statement in the Government's brief, however, in this connection that "the system" was not properly functioning at this time, nor is there a statement anywhere in its brief that the alleged conspiracy or combination in restraint of trade was not properly functioning when varying prices are referred to. If the Bureau and its members by concert of action brought about uniform prices, who, if any one, was responsible for the varying prices? The Bureau and its members conspired and combined to bring about uniform prices, states the Government, both in spot and future quotations, but what brought about the varying prices, particularly the declines? Is it not reasonable to expect something tangible to be offered by the Government as to how uniform prices were arrived at, and what caused the breaking down of the "proper functioning" of the Bureau during the periods of varying prices?

On page 136 of its brief the Government states that "this table (meaning Government Exhibit 4) shows greater variations and a more rapid movement on a rising than on a falling market, as a member is not subject to criticism for advancing his price; and he is anxious to keep up with or surpass the leader." This statement of the Government undeniably asserts that subscribers of the

Bureau were criticised for revision in prices. We vigorously challenge such a statement and assert that it is untrue and unwarranted by the record and that Government Exhibits 3 and 4 unqualifiedly show that sellers' prices declined many, many times and there is not a semblance of testimony anywhere in the record that any subscriber was criticised for either raising or reducing his prices whenever he so desired. The record clearly shows that a subscriber was free at all times to change his prices either up or down and the only requirement of the Bureau was that *after such changes had been quoted to the trade* such price revisions should be immediately forwarded to the Bureau.

Ordinarily, when a number of individuals get together and agree to fix prices and some break the agreement, one or more of those in the agreement have something to say about the fellow who broke faith. So far as we can ascertain from the record there is no proof of any agreement to fix prices, and if prices were uniform, or fixed, there is no proof in the record that any one was ever taken to task or criticised for failing to keep his prices as fixed. Nor is there any evidence in the record, so far as we can ascertain, that a suggestion or direction as to raising or lowering prices was ever made by the Bureau or its members to each other. On the contrary, we assert, that the charge of price

fixing, or price regulation, against the defendants is based solely on suspicion and the Government is endeavoring in its brief to bring about a reversal of Judge Carpenter's opinion, not on the record in this case but on theories, innuendoes and allegations based upon unwarranted assumptions. We feel, however, that this Court will carefully scrutinize the record, and the facts therein disclosed will clearly demonstrate that Judge Carpenter's opinion should stand.

On page 136 of its brief the Government also states: "The more numerous variations in quotations after February are significant, because the members then knew the Bureau was under investigation." This is another false inference based on a misstatement of fact. Variations in quotations in March and April, 1920, while more numerous than in January and February, the dull season in this business, were less numerous than during a number of months of 1919. A careful study of these tables will convince any fair minded person that they contain no indications that prices were in any degree influenced by the fact that the Bureau was known to be under investigation.

One section of the Government's brief entitled "Production, Importations and Exportations of Linseed Oil" (pages 136, 140) attempts to show that during 1919 and 1920 the prices quoted by the members of the Armstrong Bureau were not gov-

erned by the law of supply and demand; that the prices of linseed oil increased during 1919 in the face of an over-abundant supply of linseed oil. The reasoning of the Government in this respect is based upon a report issued by the Bureau of Census, Department of Commerce, and submitted in the record as Government Exhibit 8 (not Government Exhibit 9 as stated on page 136 of Government Brief).

At the end of this section, however, the Government admits that "this table manifestly does not show the actual consumption of oil * * * because reports from many concerns could not be obtained." (Page 140 Government Brief.)

On page 136 of brief, the Government states that "the total quantity for consumption in this country for the first quarter of 1919 was 86,253,310 pounds, and that the consumption reported was 35,445,224 pounds. However, on page 22 of its brief, the Government states that for this quarter, "the amount of oil sold by defendant manufacturers was 8,110,714 gallons, or, as a gallon of oil weighs seven and half pounds (R. 71), 60,830,355 pounds.

On page 22 of its brief the Government states that "during the second quarter defendants sold more oil than the quantity produced." However, on page 137 of its brief the Government states that "for the second quarter, April 1 to June 30,

1919, the production was 95,040,905 and the consumption actually reported was 50,529,147 pounds." On page 22 of its brief the Government states that during the third quarter the defendants sold 100,307,815 pounds and there was produced 129,221,965 pounds. However, on page 138 of its brief the Government states that the consumption reported was 52,032,833 pounds. No reference is made on page 22 of the Government's brief to production and sales for the fourth quarter, but on page 138 of the brief, the Government states that for this quarter the production was 139,960,360 pounds, and the total consumption reported was 51,138,445.

On page 139 of Government's brief it is stated "that for the first quarter of 1920 the production was 117,225,669 pounds and that the total consumption reported was 58,219,239 pounds. On page 139 of Government's brief is stated that for the second quarter of 1920 production was 121,406,571 pounds and that the consumption reported was 943,556 pounds or 275,683 pounds less than for the previous quarter. How the Government arrives at the last two figures is not shown, but they are not supported by the figures previously appearing in the Government's brief.

The statement is also made in Government's brief, page 139, that the total supply on hand was 216,718,890 pounds and that the stock to draw

from was 22,854,700 pounds less than for the previous quarter. This figure does not harmonize with the statement appearing in Government's brief on page 138 for the previous quarter, wherein it is stated that the total for consumption was 196,678,540 pounds.

Government's Exhibit 8 (R. 254) shows production plus importations of linseed oil for 1919 as 469,070,633 pounds and for 1920, 520,471,716 pounds. It also shows consumption plus exports for the same years as 189,198,186 pounds for 1919, and 214,204,501 pounds for 1920. If these figures were at all accurate it would mean that during these two years only 40% of the available supply of linseed oil was used and 60% was accumulated. That such an accumulation of linseed oil did not take place during the years 1919 and 1920 is shown from the testimony. In 1919 the flaxseed crop of this country was a failure and the crushers had to operate almost entirely on flaxseed from Argentina; during this period the price of flaxseed reached the high for all times (see Government Exhibit 6) (Chart) due partly to a shipping strike in Argentina. The Government makes no charge that the Bureau or its members controlled the flaxseed market. Can any one for a moment believe that the price of flaxseed could rise from approximately $3.80 per bushel on October 1, 1918, to approximately $6.20 per bushel in July, 1919,

if the figures submitted in Government's Exhibit 8 as to production and consumption and the statement as to the supplies on hand referred to in Government's brief were at all accurate? And, further, where could the crushers store the flaxseed or oil during this period and if they had such storage facilities and attempted such a gigantic undertaking, where was the money to carry such enormous stocks of seed or oil as the Government's figures indicate were carried?

The reliance of the Government on the figures contained in Exhibit 8 shows, we contend, an utter lack of understanding as to what the real facts in the record show as to the relationship between the prices quoted and the supply and demand.

It has seemed to us from the beginning and more so now, that the chief difficulty of the Government throughout all these proceedings has been its inability or refusal to understand the functions of the Bureau with its members, or the records placed in its possession and fully explained prior to the beginning of these proceedings for submission to the lower court. If counsel for the Government had considered for a moment that the record shows that approximately 75% of the linseed oil business is done in "futures" and that sales reported for a quarter do not show how much oil is being delivered for that particular quarter, he would then have known that the statistics submitted in his

brief as to production and consumption were not at all applicable to the particular periods referred to for the purpose of showing how much oil was being delivered at that time. Further, if counsel for the Government had compared the spot prices of a particular period with the prices of "futures" being delivered at that time he would see that spot oil in many cases would be selling for one price and future oil being delivered at the same time would be bringing another and in most cases, a lower price.

If a great deal of oil is being delivered on prices made in the past, and the cost of flaxseed is higher than was anticipated at the time the futures were sold, the price of spot oil at that particular time must of necessity be higher unless there is an over-supply. With the flaxseed market feverishly rising day after day during 1919, as shown by Government's Exhibit 6 (Chart) until it reached a peak in July of that year never before heard of in the industry, could it be possible that there was an over-supply of flaxseed or linseed oil in the hands of these crushers, and that despite this fact, they were sending to Argentina for flaxseed and paying prices never heard of before? If such activities are presumptive of combination or conspiracy in restraint of trade the results obtained therefrom must have been quite different from the results sought.

Why members of the Council should conspire or combine to artificially fix or enhance prices of their product, of which the Government alleges an over-abundance, and at the same time pay the highest prices for raw material, is beyond our understanding.

The rising and falling prices as well as the inactive or uniform periods referred to by the Government in this section of its brief are treated elsewhere in this brief.

ORAL TESTIMONY

As stated in the Government's brief, page 140, it relies very largely upon the facts proved by its Filed Exhibits. The brief also states that "it introduced a few witnesses who testified in substance, that the prices of oil quoted by the several members of the Bureau after its organization were uniform, or were much more nearly uniform than they were previous to its organization."

We do not question the statement that the Government "*introduced a few witnesses,*" (the total number including its own investigator being five).

William Hoch, witness for the United States, on direct examination testified he was manager of the Paint and Wall Paper Department of Sears, Roebuck & Company; that he bought all the linseed oil for that company for about twenty years; that prior to the organization of the Armstrong

Bureau in October, 1918, there was a variation in prices obtained from the different crushers at times of several cents per gallon; that after the formation of the Bureau the prices were more equalized by the different crushers, "but did not affect me" (meaning the witness) "because I had a working agreement all the time so that I was not affected by their prices in buying." He further testified:

> "I obtained quotations from the others that were merely handed to me, offered to me as an inducement to buy oil. Of course, these people did not know my arrangement." * * *
>
> "I have a working agreement with Hirst & Begley which includes the price of the flaxseed and the overhead expenses and which also includes the working circumstances, etc., in making up the oil. Whenever I was in the market for linseed oil I would call up Mr. Hirst of Hirst & Begley and would ask him what the price of linseed oil was going to be. He would tell me the market price and I would ask him what the price would be to me. He would always figure a lower price to me on account of the quantities that I bought, and in addition, that I never buy spot oil but always buy in advance, so that he can keep his mills running all the time on my orders if he has not anything else to do, and in that way I buy my oil at a little bit cheaper than the market." (R52-53.)

Mr. Hirst of Hirst & Begley is one of the defendant crushers in this case and it will be seen by the testimony of the Government's witness that uniform prices were not being charged Sears, Roebuck & Co. during the period of the Armstrong Bureau's activities with the Linseed Oil Council.

On cross-examination, Mr. Hoch testified:

> "It is a fact, that there are certain periods, and have been during all the twenty years that I have been dealing in linseed oil when there has been a uniformity in prices." (R54.)
>
> * * *
>
> "I think the highest price at which Sears, Roebuck & Co. sold paint during the year 1919 was in the Fall * * * It was $2.88 per gallon. The same price prevailed in the Spring of 1920 and continued until this Fall, or, I should say, until January." (R54.)

This testimony shows that although the price of linseed oil during the period mentioned above many times went up and many times declined, he charged the same price for paint, $2.88 per gallon, which was, he testified, the highest price ever charged by his Company for paint.

Continuing his cross-examination he testified:

> "There was a great fluctuation in the price of linseed oil which I bought. My price for paint has remained substantially at $2.88

during the two years. * * * I do not get quotations from all the crushers." (R54-55.)

Quoting from the testimony of William O. Goodrich, one of the defendants, the record shows the following: (R94.)

"I talked with the general manager of Sears-Roebuck & Co., the man who testified here, and attempted to sell him some linseed oil. That was during the operation of the Bureau. * * * I then asked him if he meant to say that he would not be interested in oil at any price I might offer, and he said he would not. I said, 'Do you mean to tell me, sir, that if I offered to sell you oil for 75 cents when it was worth $1.50 that you would not be interested in my wares?' He said, 'Not at all. It is quite a waste of time for you to talk to me.' "

Since this buyer was obviously not seeking the lowest price available, his testimony regarding existing competition could hardly be considered conclusive.

On re-cross examination, Hoch testified:

"I do not always buy at the lowest price; for sometimes there may be other things besides price. As a matter of fact, price cuts very little ice with us." * * *

"I think the terms of sale are pretty gener-

ally known. They are pretty much the same.

"Q. All satisfactory?

"A. Yes, sir." (R57.)

Solomon L. Sulzberger, witness for the United States, testified he was President of the Enterprise Paint Manufacturing Company, in business about twenty-seven years manufacturing and selling paint; that he was able to get different prices from different people before the Armstrong Bureau was organized; that while the prices were not uniform they were close; that after the Bureau was formed the prices were uniform. (R58.)

On cross-examination he testified:

> "I could not answer as to when during the operations of Armstrong Bureau any of these crushers quoted me the same prices at the same time * * * I never told a crusher that I could get linseed oil at a lower price unless it was true. I never did that unless it were true, and it has not been the case in a good many years. I did do that in the earlier years before this Armstrong Bureau." (R60.)

Particular attention of the court is invited to the following testimony of this witness:

> "I think I would be opposed to a very unsettled market in the linseed oil industry. Violent fluctuations would be a serious menace to any dealer in oil such as I am. My present

contract is a burden to me because I have lost money on it. The reason for that is that there has been a violent fluctuation in the price of oil. Not merely a fluctuation; it has been a general decrease." (R60-61.)

* * * * * * *

"We know when we buy oil that we are speculating. Any man who buys a thousand or two thousand barrels of oil which is to be consumed within the period of six months or three months to follow is speculating. We use our best judgment. It is not a question of the market fluctuating. You see, the market was pretty steady when I bought my oil last August, and it has gone down very badly since. So the fluctuations in the market are not the things that cause me to buy. There are certain times when we have to prepare ourselves to establish the cost of our finished material into which the oil goes. There are certain seasons of the year when we prepare ourselves for the coming three or six months. We use our best judgment, and that is the only answer I can give as to the time we select to buy. I think any linseed-oil buyer will substantiate my statement that during the past twenty years every man was a good buyer, because every time he bought oil it went up, and consequently we have no recollection of what happened at the time we bought. We only know that we made money by buying. That has been the history for the last twenty years,

even during the reign of the Armstrong interests.

"It is a fact that all through my experience there has been periods when the prices quoted by the different crushers would be substantially the same and that there would be other periods when the prices would vary some. It has been my experience, even during the Armstrong regime, that flaxseed or the price of oil would fluctuate; that at periods it would be more stable—that is, it would run along when there would be more of an equality as to price —and that there would be other periods when there would be a variation in price. In buying oil I endeavor to get the best price and to get the best delivery. The question of delivery was of sufficient importance so that I might show a preference between two people of the same price, but I would not pay any more for that privilege. That accounts for the fact that I bought oil from the different members of this association.

"During this period there were brokers going out and buying oil and speculating in it. That was against our business, and I think that it was against the interest of the purchasing public."

"Q. It was a matter of importance to you and to those who purchased your product and who used the product of linseed oil that there should be eliminated this speculation?

"A. It should be the natural supply and

demand and not an artificial one.

"Q. And that is what governed it all during your experience?

"A. Yes, sir.

"Q. The fact is that that is what governs the oil market even under the Armstrong Bureau?

"A. Yes.

"Q. So that, in your opinion, as a dealer and as a buyer in large quantities, the market for linseed oil even during the two years of the period of the Armstrong Association was controlled by the law of supply and demand?

"A. To a large extent, I should judge.

"Q. You never felt that there was any association to prevent you from buying oil at a fair price, did you?

"A. No; I never thought so.

Cross-examination by Mr. Congleton:

"I usually buy oil on six months' contract for equal deliveries each month, or something of that sort. During the operation of the contracts I am out of the market for the purpose of buying oil, but I am still sufficiently interested to know what the price of oil is, because we sell some oil, and we have to sell it at the market price. We are guided entirely each day by the price of oil when we quote a price on oil. We do not aim to get any more or any less than the crusher. Buying and selling oil is a part of my business, and in connection

with it I keep myself fairly acquainted with prices and price ranges. I think that in 1918 the price was somewhere around $1.75, and that it went up as high as $2.25. I think that in 1919 the price was $1.50. I am speaking now of oil and cooperage. I think I remember some oil bought in the fall of 1919 for $1.52 or $1.50, which went up as high as $1.75 or $1.80 in the spring of 1920. The price began to come down in July or June, 1920. It got down to about $1.12 in August, and it has kept continually coming down until the present time. I would not call it a violently fluctuating market, except the last six months. During this period I got some postal cards from the crushers every day, but they did not contain the carload price. I cannot tell you how often I got carload prices, but I got them once a month, and possibly more frequently. I would have no means of knowing if there was any spread or range in the various crushers' prices during the periods in which I did not ask for quotations. In selling my oil I attempt to follow the linseed market, but that is not always a good way, because I have seen flaxseed go up and oil come down and flaxseed go down and oil go up. The flaxseed market is a very feverish one. I cannot recollect any time during the period of the Armstrong Bureau when I thought the price of oil was out of proportion to flaxseed." (R61, 62, 63.)

T. J. Hurtz, witness for the United States, testified he was Traffic Manager and Purchasing Agent for Bradley, Vrooman Paint and Varnish Manufacturers; that he bought linseed oil for fifteen years; that some time before the Fall of 1918 there seemed to be a variety of prices when he would ask for quotations; the next Spring that variety seemed to be passing; the price he would ask and get from the various crushers would be the same. (R55.)

Government's Exhibit 3, clearly shows that from October 1, 1918, until the Spring of 1919 the price of linseed oil declined greatly with varying competitive prices over a large portion of this time.

On cross-examination Mr. Hurtz testified:

> "I do not think the price of linseed oil ever affects the price of our paint." (R56.)

On redirect examination he testified:

> "In stating that the price of linseed oil did not determine or reflect the price of paint, I was speaking about the price which my own Company makes for paint. We are a comparatively small company in the business, and in fixing our selling price follow the lead of the big companies and that is what determines our selling price and not the price of linseed oil."
>
> "Carpenter, J. Then when you get information from any source that some of your

large competitors have raised prices you raise yours?

"A. Not always.

"Q. Well, generally, if you can get it?

"A. No; we have not in the past two or three years. We have been very slow to follow. Eventually we have raised, because we are in no different position than they are. Our costs have gone up, but they have not gone up possibly as far as some of our competitors. We have not raised our prices as fast as some of them.

"Q. But you make use of the information that you get of your competitors' prices?

"A. Naturally." (R56-57.)

Merritt A. Richardson, witness for the United States, testified that he was President of the Inland White Lead Company; bought linseed oil from the crushers for seventeen years; that his experience as to securing competition in price prior to the formation of the Armstrong Bureau was that "it was always rather close," that after the Bureau was formed "there was no competition and no difference in prices;" that William O. Goodrich, one of the defendant crushers, visited him at his place of business and he complained to Goodrich about the terms and told him that he was hard up and asked Goodrich to give him longer terms; that Goodrich replied, "Well, I do not see why I could not renew this acceptance for another

thirty days," which he did. (R63-64.)

On cross examination Richardson testified that he heard of trade acceptances two or three years ago; that he did not know what the range of prices were during the operation of the Bureau; that he recalled that the high market for flaxseed during this period was $6.40 per bushel, and stated, "You bet that did have something to do with the rise in the price of linseed oil." Every time it went up, up went oil. The price of linseed oil usually follows the price of flaxseed on an up market. It does not follow so rapidly on a declining flaxseed market.

> "*My costs were advancing during the period from October, 1918, until six months ago. We did not change the price of paint as frequently as the oil people did, as that makes it too unsettled for our customers.*
>
> "We try to make a price for paint for six months. * * * The fluctuation in the price of paint is a bad thing for our customers, because we can't change bills every time a man buys if they buy every week, as a lot of our customers do. *We have regular prices for paint and do not give everybody a different price.*" (R65.) (Italics ours.)

ORAL TESTIMONY OF WITNESSES FOR DEFENDANTS

George F. O'Neil, witness for defendants, testified that he was President of the O'Neil Oil & Paint Company; that he purchased linseed oil for

twenty-five years; that for several years he had made notations of quotations made by different crushers to his company; that as quotations came in to him he entered them in a list and kept them from time to time for reference. These notations appear in the record as Defendant's exhibit 1 (R676-680), and begin from June 3, 1919.

We respectfully request the Court to carefully examine this exhibit for the purpose of ascertaining whether or not it discloses the fact that varying prices were being quoted by the members of the Bureau during this period. The witness testified that he got these quotations continually from the agents that came into his office and verbally over the telephone; that during the years 1919 and 1920 competition on the part of the crushers to get his business was as great as at any other time; that when he wanted to buy oil he would ask the different crushers for their prices and then would buy from the one that had the lowest price and the best delivery on the goods he wanted. (R73, 75.)

The cross-examination of this witness by the Government was very brief, being as follows:

> "When I stated to one of the crushers that I had gotten a lower price from another I would tell the truth; it was not my habit to misrepresent that fact." (R75.)

Daniel A. Murphy, witness for defendants, testified that he was Secretary of the Wadsworth-Howland Company, and attended to its purchases of linseed oil for about twenty years; that there was competition between the crushers before September, 1918; that there were times when there was no variation in prices, and these were periods when the market was quiet; that the quotations after September, 1918, were not always the same; that the quotations would vary at times from one to four cents per gallon; that the variations continued from September, 1918, to June, 1920, and indicated to his mind that there was active competition between the crushers for his business. (R102-103.)

The cross-examination by the Government of this witness was likewise very brief, being to the effect that while he received the same quotations from one or two at times, there was as a rule a spread in prices. (R103.)

John E. Thomas, witness for defendants, testifield that he was a paint manufacturer; that he got quotations from the crushers over the telephone every day; that he knew of the existence of the Armstrong Bureau with the Linseed Oil Council; that he was able to get varying quotations from the crushers, but at times they were uniform; that there was not much variation,—between one, two or

three cents; that there was no material difference between the spread in prices during the operations of the Bureau than before; that they usually bought oil on the advice of crushers as they figured the crushers were in closer touch with the situation; that they had a "pet" crusher, and he advised them when to buy; that he had been doing business that way for six or seven years and found it very satisfactory; that they also checked up the prices given them with the quotations and found that they were being fairly treated; that the operation of the Linseed Oil Council under the Armstrong Bureau never worked an unfair burden upon him as a buyer. (R103-104.)

No cross-examination of this witness appears in the record.

Herbert L. Baumgardner, witness for defendants, testified that he was President of the Holland Core Oil Company which manufacturers core oil, a substitute for linseed oil; that he has bought 8,000 to 10,000 barrels of linseed oil for his business per year for the last ten years; that he has kept in touch with the linseed oil market; that in the period of about six or seven years prior to September, 1918, he found a competitive spread between the prices of the various crushers; there were times when the crushers were quoting the same prices; after October 1, 1918, up to June 30,

1920, he found a spread of from one to four cents per gallon; during the last five years his purchases were made on the recommendation of one crusher whose prices were verified from time to time from other crushers; that when he did not obtain as favorable terms from him in the matter of prices as from any other crushers, he bought from the others; that the question of service is a consideration to a buyer of linseed oil. (R107-108.)

On cross-examination he testified that:

> "Before the Armstrong Bureau was formed we found fluctuations in prices from time to time as we inquired for them, and we found changes in prices after the Bureau was formed. We did not find that the market was somewhat more stable after October 19, 1918.
>
> "Our one crusher would not always meet the price of a competitor if it happened to be lower. I would say it was about even. Sometimes we would get them down to the competitor's price and then there were times when we could not. I have not noticed any particular variation in the attitude of the crusher during the last two or three years." (R108.)

Additional buyer witnesses for the defendants were presented in the lower court for examination, but Counsel for the Government stipulated that they would testify the same as other buyers

had testified and for that reason they were not called to the witness stand. (R123.)

All of the defendant crushers or their executive representatives testified in the lower Court and not only did they deny that they had entered into any agreement with reference to prices, but their examination went into great detail as to how they conducted their business while connected with the Linseed Oil Council under the Armstrong Bureau. In the course of such examination Judge Carpenter asked many searching questions with respect to their activities while in the Council.

Below is given a resume as to the defendant crushers' testimony with respect to how they arrived at the prices they quoted their trade.

J. A. Mann in part testified as follows:

* * * * * * *

"We market our linseed oil directly from our main office in Buffalo and through agents. The agents are purely agents, who sell the oil at the price we direct and get their commissions just like any other commission business. We, of course, try to base the price at which we or our agents sell the linseed oil on the cost of our raw material with a profit added, but we cannot always do that. We have to be governed by what somebody else is doing. Our big competitors usually force our prices. The first great consideration in fixing our price for

oil is the cost to make it, which we figure out as nearly as we can. Then, of course, we try to get a higher price than that. That is legitimate business; but, as I say, we often times have to meet with much lower prices than it has actually cost us. That is, I think, true of any business." (R67.)

* * * * * * *

"Before we became acquainted with the Armstrong Bureau we could discover what the market was when we would offer linseed oil to a buyer and he told us that he could buy at a lower price—if the buyer told us he could buy lower than our quotation we would have to accept that as the probable condition of the market. We market our oil east of Chicago, and we never go west of Chicago. Our agencies all over keep us posted as to the state of the market to a certain extent, but often we have to advise our agencies as we sometimes hear of things before they do. The agents telegraph us or write us that half a dozen of our competitors are naming such and such a price and inquire what they should do. If we want to meet the price we say yes; if we don't, we say no." (R67-68.)

* * * * * *

"Besides finding out about competitors' prices through our agents generally, we find out about them in bucking up against the prices of others, as it does not take long to discover them then. If you have something

to sell and somebody else has got something to sell, you very soon find out what the other fellow is going to sell at; and of course, if you are going to sell you have got to at least do as well. I think that is true of any commodity. The information that we receive from our representatives and from buyers in reference to the conditions in the market is not always reliable by any manner of means. That causes a wide fluctuation in markets." (R68.)

* * * * * *

"When we made a price to a buyer we would wire it in to the Armstrong Bureau within two or three hours; and if our competitors kept their word, they were doing the same. If I made a price which was below the market price and reported it to the Armstrong Bureau, I could make any other price in five minutes if I wanted to. If I went below what other competitors were quoting I absolutely never felt under any obligation to maintain that price for any particular time. If someone reported a different price I would be governed entirely by our own business conditions. If we were anxious to trade I would very likely make a lower price and sell and get all the business I could. If we were pretty well sold up I would pay no attention to it." (R68-69.)

* * * * * *

"We often learned of our competitors' quotations before the Armstrong Bureau could

get it to us. In that event I would do exactly as I would do now when we are not in the Armstrong Bureau. If we wanted business badly I would go out and go lower; if I did not, I would ignore it. I would regard the Armstrong Bureau information as reliable and the other information that we pick up as sometimes reliable and very often unreliable." (R69.)

* * * * * *

"Either I or my son controlled the prices made by our plant. My son consults with me with reference to prices, and our prices were never at any time controlled or directed by anything other than my own judgment as to what they should be. I never attended any meeting with any of these crushers outside of the Armstrong Bureau." (R71.)

* * * * * *

Samuel Mairs, in part, testified as follows:

"The elements entering into the determination of the price of linseed oil are the working costs and what we think we can get for the cake or meal at the time it is manufactured, depending upon whether it is a spot market in which we are selling the oil or a future market in which we are selling the cake. The cost of flaxseed and the working costs are elements entering into the consideration." (R75 and 76.)

* * * * * *

"The quotations which we received from the Bureau sometimes might show that prices had declined or had advanced." (R77.)

* * * * * *

"Q. Are you operating any differently now than you did when you were connected with the Armstrong Bureau? I mean in fixing your prices or in the way of marketing your goods or in the way you ship your goods or in the prices that you charge?

"A. No, sir.

"Q. Is there any difference?

"A. No, sir; none that I know of.

"Q. Then, as I understand, the sole purpose of the Armstrong Bureau arrangement was to get accurate information?

"A. That was the main purpose.

"Q. Did you get anything else other than that?

"A. No, sir." (R80.)

* * * * * *

"I helped to make our company's prices. We would talk over conditions as to whether we wanted to change our prices or not, and when we had decided to do so we would make quotations, would change our prices and then wire the Bureau that we had done so. That information might not have gotten out promptly. It might have been delayed, but our aim was to send it out promptly. By changing our prices I mean that we would send telegrams to our agents and to any other people who

were inquiring for oil. At the same time we would tell the girl to notify the bureau. The instructions were that the information to the bureau should go out afterwards. Sometimes it didn't go out right away. It usually, however, got out fairly well after we had made a change. We might have put in a new price and have changed again and reported to the bureau. We could change our price every five minutes if we wanted to." (R81.)

* * * * * *

"Q. Did you, in connection with other things, take account of that information which you received through the bureau as to the prices of the other crushers when you made your own prices?

"A. We took the flaxseed market into consideration and we took the cake market into consideration. I would not say we took the other fellow's prices into consideration. If we felt as though we wanted to reduce our prices, we would have anyway.

"I am asking you whether you took account of that information which you received through the bureau?

"A. Oh, we made a note of it; yes.

"Q. You took account of that when you were figuring your own prices; took that into consideration along with other things?

"A. Yes." (R82.)

William O. Goodrich, in part, testified as follows:

"I used the information that I got from the Armstrong Bureau to check up my own line of action as to whether or not I could afford to make a price such as was being quoted in connection with the cost and the price of seed. * * *"

* * * * * *

"Q. But did you feel under any obligations to continue the price that you had made for any length of time?

"A. No, sir.

"Q. Did you ever give any assurance to anyone that you would not change your price for any definite length of time?

"A. No, sir." (R93.)

* * * * * *

"I, in fact, always competed while affiliated with the Armstrong Bureau, the same as I competed previously or afterwards. I usually go out to get business by first ascertaining what my own position is with relation to selling—how anxious I am to sell. Then I find out what my costs are, find out what the general market is, and see whether I can afford to cut under somebody else's prices or whether I can afford to meet that person's price. When there is a prospective customer who I think would be an advantageous customer, I usually try to quote him a price that will sell him." * * * (R94.)

* * * * * *

"I never feel in any way under any obligations to follow the prices of any of my competitors. The fact is that I deviate very often from their prices. Their prices are only a guide to me as to the general condition of the trade. My own price has always been a matter for me to determine, depending on my anxiety to sell and my purchases of seed. I might have been fortunate in buying some seed before the price advanced, so that I was able to make a quite drastic cut without actually losing money, and when there was such circumstances, I did so." (R97.)

* * * * * *

"The Philadelphia incident was not the only transaction where I undersold my competitors. I needed money, or I would not have made the price, but I did that very frequently. When I had the stock and needed the money, I made the price that would give me the customer, and what anybody else's price was had no bearing on the question." (R99.)

* * * * * *

Recross-examination by Mr. Mitchell:

"Q. Having definite information through the Bureau of the prices on file by the larger crushers at any given time and knowing that those prices were found to be adhered to until notice was given to the bureau and relaying it to everybody else, having that knowledge as to the prices would tend to prevent you from

making a sale at very much under those prices, would it not?

"A. First of all the question, as you put it, in which you state that I know the prices will be adhered to, is not really in accordance with the fact, because I did not know that. Consequently, I would not be very much influenced in my action by the fact of their making a specified or specific price. My action would be entirely determined by my own conditions and my own anxiety to sell.

"Q. Well, weren't they bound the same as you to adhere to filed prices until they notified the bureau of the change?

"A. No. They made the prices——.

"Mr. Mitchell. G. Unless they notified—if a special sale was made—unless they sent in immediate notice?

"A. No, sir.

"Q. Which also was sent to you?

"A. No, sir. They were at liberty to change their price at any moment.

"Q. With notification?

"A. After, after they changed the price.

"Q. With immediate notification?

"A. Yes; but that notification could not in the natural course of events come to me for quite a considerable period of time after the deal was over and consequently I might be out of the market.

"Q. Well, how long?

"A. And unable to sell; in that condition when the notice was received.

"Q. How long a period of time would that comprise? Time to send a telegram to the bureau and for the bureau to send out a telegram?

"A. Yes.

"Q. That will appear of record.

"A. But that was quite a considerable time sometimes.

"Q. Well, that length of time, the minutes or the hours in some instances, will appear in the record, of course?

"A. Yes; it does appear in the record, but, as a matter of fact, it was often twenty-four hours owing to the delay of telegrams.

"Q. One coming out late one afternoon would not get to you until the next morning?

"A. No. I have frequently known cases where I have made a price, have telegraphed it into the bureau, and the information was not received by some of the others until the following day owing to delays of the telegraph company, or clerical delays in the office. Consequently, I never felt a great deal as if I could place much reliance upon the quoted price. In other words, I knew that if I really wanted to sell the oil it was up to me to make the price that would sell it.

"Q. And you attached no importance to the fact that you had received this notice of price, which was on file by the large crushers with

the bureau, and that they were bound to give immediate notice through the bureau to you of any change?

"A. Why, certainly I attached some importance to it. It is one of those things which gave me a guide as to the general trend of the market.

"Q. In making your own price?

"A. Yes.

"Q. You would take that as one of the guides, would you?

"A. Yes; certainly." (R100 and 101.)

George A. Martin in part testified as follows:

"The Sherwin-Williams Company subscribed to the Armstrong Bureau because the linseed oil industry was the most unsatisfactory that we had to contend with, and we believed from the information given by those who tried to introduce the service that we could and possibly might eliminate some of the irregularities or abuses which were beyond the control of any one individual. First among those irregularities or abuses I would mention the wide fluctuations and the speculations in flax, and things of that sort. Others were the disparity in probably freight conditions. No one crusher alone had the power or prestige to influence or correct some of the abuses which were practiced by others."

* * * * * *

"Q. In what way did the quotations which you received from the bureau affect your business as a consumer of oil?

"A. It was a guide to start on, that is, it was a more reliable guide than we had had prior to the formation of the bureau. We did not have to do so much feeling out to see what the market was.

"We only sell at wholesale on rare occasions, when we find that we are in wrong on the market and believe it advisable to get out in a hurry. We then cut at a sacrifice to a competitor. Our principal business as a crusher is to consume our own oil or to sell it at retail to small customers.

"I only attended about six or eight of the meetings of the Linseed Oil Council at the Armstrong Bureau. There was no discussion at any of these meetings as to the prices which were to be charged by any of the crushers, and there were no understandings or intimations of any kind as to prices which any one should thereafter charge."

* * * * * *

" * * * There was practically no difference; that is, as to the spread during the affiliation of the crushers with the Armstrong Bureau and previous thereto, and since it ceased." * * * (R104-105.)

* * * * * *

"We were only in competition with the other crushers at times when we wanted to unload

and get out of the market, or something like that. We would then call on or write or telephone to certain accounts to see if we could make sales. On such occasions when we have unloaded we are not bound by any obligation of any kind to maintain or fix or give any price, or to lower the price or to enhance the price. We purposely cut the price when we want to. (R107.)

F. Carlton Smith, in part, testified as follows:

"In receiving the reports from the Armstrong Bureau we acquired accurate information as to market conditions. Whenever Mr. Ramsay was absent I made the prices for the company. We have a capacity of 25,000 barrels of oil per annum, which is very small compared to the other crushers. There was never any attempt on my part at any time to follow the leadership in the market of any other crushers. The making of the prices depends largely upon our stocks, what we have already sold, or what we have for sale, our opinion of the market as to whether it would go up or would go down. It was a matter of personal judgment. The information from the Armstrong Bureau helped us by giving us accurate information as to price conditions, and as to the volume of sales that were being made. Mr. Ramsay never instructed me as to how I ought to determine a price in considering the figures I received from the Armstrong Bureau.

I never felt under any obligation to maintain a price for any particular time. We might change our prices twice a day, if we felt so inclined, and we have, in fact, done so during the time of the operation of the Bureau. Such rapid changes might have been due to fluctuations in the flaxseed market or to war conditions.

"We sometimes cut prices to meet competition when we might want to sell oil." * * * (R108-109.)

* * * * * *

"* * * None of the other crushers ever in any way criticised me for any price I had made at any time. We would not submit to it, for one thing."

Cross-examination.

* * * * * *

"Q. Well, why did you want to know about the market prices?

"A. So we could do business intelligently.

"Q. Did you follow the market at all in making your prices?

"A. One always has to follow the market when they sell, Mr. Mitchell.

"Q. Well, that was my impression.

"A. Yes.

"Q. I am glad that you have the same one I have.

"A. At least I have found it so.

"Q. How did you ascertain what the market was, then, while the bureau was in operation?

"A. We got it from the reports.

"Q. Through the bureau?

"A. Yes.

"Q. Yes. What does the market mean? What do you mean when you say the market? Don't you mean the prices that other crushers were selling at?

"A. I mean the prices that anybody was selling at, be they crushers or brokers or speculators or anybody else.

"Q. Who sells the most of the linseed oil? The crushers?

"A. The crushers would naturally sell the most of it; yes.

"Q. The prices—the crushers determine what the market was?

"A. They would determine the market level; yes.

"Q. Yes?

"A. Of course." (R109-110.)

Louis N. Leffingwell in part testified as follows:

" * * * Our determination of the price to charge for oil depends on the price of flaxseed, the working cost, and what we get out of the meal. There was no time that I felt obliged to maintain any price for any particular time. I never gave any assurances to any one that I would not reduce a price. I at-

tended all of the meetings of the Linseed Oil Council under the Armstrong Bureau, and there was never at any time any discussion there as to the prices that the crushers were to charge for their product. The minutes of the meetings, I think, set forth the nature and the substance of the deliberations. I never, directly or indirectly, gave any assurance to any of the other crushers as to any price or as to any change in prices that I would make at any time, and they never gave me any assurances as to any prices which they would make or any changes of prices which they would make. We never talked about prices at all." (R110-111.)

* * * * * *

Cross-examination.

"In establishing our prices, if we want to meet competition and know what others are getting, we have to quote as low as they do, or we would not get the business. So we certainly take account of the prices which the others are making in making our own prices, and we get that information as to the other's prices through the bureau." (R112.)

* * * * * *

" * * * The only benefits secured through the bureau would be the fact that we would know what the other crushers were doing, how much seed they were crushing, how much oil they were selling, and what prices

had been quoted. With that information you naturally can do business to better advantage than if you were not posted as to what was going on.

"Carpenter, J. That is a little knowledge of their private business life that you would not have acquired had not you and they belonged to the bureau.

"A. That is the idea, your honor." (R113.)

* * * * * *

"Carpenter, J. Suppose there were just six oil crushers in the country and none of them belonged to a bureau of this sort. They might have some difficulty in knowing of the market conditions.

"A. Certainly.

"Carpenter, J. Then, they all joined the bureau. Everybody opens his books and heart to everybody else. What would be the natural result to them in the oil business, and what would be the effect on the consuming public? What I want to find out is—whether, if you get an advantage on something, where is the detriment? Where is the other side of the measure? You are getting something now that must come out of something or somebody.

"A. The only advantage we get is that the better posted we are on the business, on the conditions existing as to the amount of raw material, the manufactured material, the better position we are in to know whether to sell or not.

"Carpenter, J. Exactly. Now, against whom does that advantage run?

"A. I do not know that. The buyer of linseed oil may buy his oil just as cheap on the average all the year along, if we are in a better position to know what we are doing than if we are not. He may strike some average. Sometimes we may sell cheaper and lose money."

"Recross-examination.

"If we are in a better position to know what we can make oil for and sell it at we are going to sell as near cost price as we can with a little profit, and if we are not in a position to know the conditions existing we are naturally going to ask a little bit more in order to be protected in case the market goes the wrong way. In that event, I think, the buyer of the oil would have to pay more for it. I would not say that in the absence of such a system as obtained under the bureau we were likely to sell our oil at a higher price. It depends upon conditions. I believe the disadvantage to the ultimate consumer in blind competition lies in the fact that if a crusher is posted on conditions he is bound to sell his oil a little bit closer to cost price than if he is not posted. (R113-114.)

Frederick K. Quine, in part, testified as follows:

"* * * When we made our quotations to the bureau they stood, unless we changed

them, but we were at liberty to change them at any time that we saw fit. We, as a matter of fact, made actual sales before reporting to the bureau, reporting the change of price to the bureau just the same, and when we made a quotation which was at variance with our filed price, as we did when we made a sale which was at variance with our filed price.

"As far as our company was concerned we used the information which we received from the bureau in checking up the various reports which we got from our field agents. We have a great many resident salaried managers at the large buying centers in this country. The advantage of getting the information from the bureau was that we considered it reliable and a perfect check against the reports which came to us daily or otherwise from our various men. Reports from the men were not always reliable, and we have to take them for what they are worth.

"In making our own prices we first took into consideration the cost of the raw material, the expense of manufacture, what we could get for our by-product, the cake or meal, and the result was the cost of linseed oil to us. If we could get cost, we would get it and a profit, if we could. The statistics from the bureau were not of very great importance to us in making prices to the trade because we were making our own prices. We figured our own cost and we buy our own raw material. We many

times cut under the prices that were quoted by our competitors, our position in that respect depending entirely upon the ordinary market position with relation to the amount of oil which we had on hand for sale, or the amount of oil we had for future delivery. We might not care to sell at lower than the price which we were quoting today, and the situation might change day after tomorrow, depending upon the price of raw material."

* * * * * *

"In my judgment, and experience, this system did not in the slightest degree have any tendency to fix prices. From my knowledge I did not observe any attitude or disposition upon the part of any of the crushers in making prices to follow the leadership of any other crusher." (R115-116.)

* * * * * *

"Q. Is this a fact, as you regard it, that in the operations of the bureau your obligation with reference to your quotations, filing them through the bureau, and adhering to them, was only this—that you should, having filed a price, that you should not deviate from that price without notifying the bureau? Is that correct?

"A. No; we would not deviate from that price unless we afterward notified them of it." (R120.)

Ralph Bolton, in part, testified as follows:

"Whenever I saw a profit on the reproductive value of the seed I fixed a price to move the oil. I have at times cut below the prices filed by the other crushers. I attended all but three of the meetings of the Linseed Oil Crushers' Council, and there was no talk at any of those meetings of prices which any of the crushers might make, and no understanding as to what prices might be charged.

Cross-examination.

The prices came along from the Armstrong Bureau, as well as information as to the movement of the oil. The prices did not interest me because I could get information through our own sources, but I could not get information as to oil movements through any sources other than the bureau. The information as to prices was nothing new to me, as I knew what was going on in our territory all the time and would never be more than two or three hours behind any change of prices, however I might get the information. I never attempted to follow the market. I followed the flax market. I was out to sell oil at a profit wherever I could do so on the flax market. I had no idea what any competitor was going to charge at the time our buyers got our prices, as the prices could change in 10 minutes." (R124.)

Charles T. Nolan, in part, testified as follows:

"* * * The price information received through the Armstrong Bureau—that is, the prices filed by the other members of the council—were to guide us to a certain extent in determining what prices we would make at which to sell our linseed oil, as well as other basic principles and rules. It did so, for this reason: We realized if we maintained our price any great length of time at a level below the price information we got, we could not supply the demand and would not have any oil on hand for more than a few days. On the other hand, if we maintained our prices at a level above this price information which we got, we probably could not run our mills long, as we would accumulate a stock beyond our ability to store it, and we would not care to do that at any rate. We would be governed by the information received to the same extent as if we had received price information from other sources. We would aim to have our prices at such a level as to dispose of our product." (R126-127.)

John W. Hirst, in part, testified as follows:

* * * * * *

"* * * In selling linseed oil I nearly always took into consideration in fixing my price the cost of replacement. I do business in a very peculiar way. I have always, in building up the trade I have in Chicago, based

my price on cost plus, and did so during the time I belonged to the Armstrong Bureau.

"I have an idea that I sell about 75% of the oil that is used around Chicago, and I keep that trade and make my sales in competition with the other crushers." (R147.)

WHY CRUSHERS JOINED THE BUREAU

An examination of the contract between the Bureau and the Linseed Oil Crushers explains in large part why the individual companies entered into the service agreement set forth in the record. This contract discloses the fact that the purpose of the bureau and its subscribers was to obtain statistical data pertaining to the linseed oil industry, which was at all times accurate and up-to-date and could be relied upon by the members to intelligently prepare their course of conduct in the buying of flaxseed and the sale of linseed oil.

Many of the representatives of the defendants testified as to why they joined the bureau, but the Government in its brief, pages 142-145, while quoting or referring to some of the reasons, attempts to place a construction upon the same which belittles and disparages the sincerity of the reasons given by the defendants. Further, an examination of this portion of the Government's brief discloses the fact that Counsel for the Government has not altogether confined himself to the record. For in-

stance: on page 143 of its brief the Government has quoted a statement which it says was made by Mr. Nolan of the National Lead Company. The record shows that this statement was not made by Mr. Nolan but by Mr. Leffingwell of the Northern Linseed Oil Company. It does not make any difference who made the statement but the reference in the Government's brief is called to the Court's attention as another instance of the inaccuracies permeating the Government's brief throughout.

The Government, in its brief, 142-145, quotes excerpts from the testimony of some of the representatives of the defendants as to why they joined the Bureau, following such excerpts with statements, which we contend are wholly unsupported by the facts. In quoting Mr. Mairs of the Archer Daniels Company as having testified that "we joined the Armstrong Bureau in order to get market quotations which we felt would be reliable, and to get any other advantages which the Armstrong Bureau could bring through intelligent marketing of linseed oil," the Government states that Mr. Mairs could think of no specific advantage other than market quotations. If Counsel for the Government was at all familiar with the entire activities of the Armstrong Bureau as set forth in the record, he would know that "any other advantages" referred to by Mr. Mairs was specific

enough without enumeration. Further, when the Government states that Mr. Goodrich testified that he did not know there were any conditions in the industry that led him to join the bureau, they were taking that statement too literally, because Goodrich's testimony on this point quoted in the Government's brief set forth the conditions of the industry as pertained to Mr. Goodrich's business, and certainly were specific.

In quoting Leffingwell (not Nolan) in its brief (page 143 Gov't Brief), the Government states that Leffingwell claimed that the co-operation referred to in his testimony had nothing to do with prices. What Leffingwell actually testified to in this connection is quoted below:

> "If you wanted a half barrel of oil I would charge you 65 cents a gallon, or 5 cents over for the half barrel, whereas somebody else would charge 60 cents per gallon, plus $1.50 additional. The purchaser would pay the same price, but it would be better for each of us to go along on the same basis, instead of one charging so much a gallon extra and another so much for the half barrel. I think it is an advantage all the way through to have a market uniformity. I do not say as to prices, as prices have nothing to do with it in any way, shape or manner, so far as joining the bureau is concerned. We did not take that into con-

> sideration at all when we joined the bureau and, in fact, I do not know anything about it." (R112.)

Now it is clear from the above that what Leffingwell was *not* referring to was co-operation as to fixing prices, and further, there is nothing in the record so far as we can ascertain that "the system can work so nicely as to terms of sale and other practices incident to the trade." It is a matter of record that the terms of sale were not uniform and were not followed as recommended at the Council meetings, for the reason that several members of the bureau did not feel inclined to use the terms recommended; and as set forth in the contract, were free to use their own judgment in conducting their own business. The only requirement was that any change in attitude toward terms already on file with the bureau should be bulletined to the bureau for distribution to the other subscribers.

John A. Mann of the Mann Bros. Company, of Buffalo, testified:

> "The Armstrong Bureau had been in existence with the other crushers about a year before we had anything to do with it. Our primary motive for becoming affiliated with it was more accurate information as to market conditions." (R68.)

William O. Goodrich, President of the Goodrich Company, testified that his reason for joining the bureau was that he regarded the plan proposed by it as a very good one which would change the general feeling of distrust and lack of confidence between the various members engaged in the industry, and dispel the general darkness that surrounded him in his attempt to gauge conditions, and said:

> "Those conditions had always existed in the past. With regard to doing business in the dark, I mean that I am one of the smaller crushers in the industry, and am, perhaps, under a great deal more of a handicap than some of the larger ones, in that I do not have the same diversified means of obtaining information as to market conditions and conditions of the trade. I was dependent largely upon such information as I got from the buyers of linseed oil as to what was doing. * * * It was very largely prejudiced and given out with the very definite idea of misleading me. * * * That was the usual method of procedure." (R93.)

George A. Martin, of the Sherwin-Williams Company, testified in part as follows:

> "The Sherwin-Williams Company subscribed to the Armstrong Bureau because the linseed oil industry was the most unsatisfac-

> tory that we had to contend with, and we believed from the information given by those who tried to introduce the service that we could and possibly might eliminate some of the irregularities or abuses which were beyond the control of any one individual. First among those irregularities or abuses I would mention the wide fluctuations and the speculations in flax, and things of that sort. Others were the disparity in probably freight conditions. No one crusher alone had the power or prestige to influence or correct some of the abuses which were practiced by others." (R104.)

The Government in its brief states that "the bureau certainly made no effort to control fluctuations in flax, nor did it modify freight rates except by adopting the zoning system, which did not affect in the least the actual rates." Whether the bureau did or did not make an effort to control fluctuations in flax, or did or did not attempt to modify freight rates, does not sustain the Government's contention as alleged in the bill of complaint and now argued in its brief, that the Sherwin-Williams Company joined the bureau to carry out a combination or conspiracy in restraint of trade. Mr. Martin was testifying as to why his company joined the Armstrong Bureau, and there is nothing in the record that contradicts in any way the

truth of his statement, but the Government by innuendo tries to cast a cloud on such a statement and insinuate that the statement is not true and that the purpose of joining was an unlawful one. Further, it is a matter of record in this case that Mr. Nolan, Sales Manager of the National Lead Company, a defendant herein, was head of an organization whose efforts were devoted to the building up and greater development in the growing of flaxseed. Further, an examination of Mr. Martin's testimony as quoted above will show that his Company did not join the bureau to get it and its members to modify freight rates, because most people know such a thing can only be brought about, not by conspiracy or by combination, but by application through the Interstate Commerce Commission.

What Mr. Martin was referring to probably was the difference between freight rates or freight conditions on linseed oil as compared with other commodities.

In connection with the Sherwin-Williams Company's reasons for joining the bureau, it is interesting to read Mr. Martin's letter of March 13, 1919 (R429), stating that his company uses all of the oil it crushes in its own factories. It is common knowledge that Sherwin-Williams is one of the largest users of oil in the world, as paint manu-

facturers. It would seem somewhat improbable that they would join any organization for the purpose of enhancing or fixing prices for a material which many times they had to buy in the open market, and seldom, if ever, sold.

F. Carlton Smith, of the Minnesota Linseed Oil Company, on cross-examination testified that:

> "Our company joined the Armstrong Bureau to get accurate market information, by which I mean to know what the market conditions were and what prices were.
>
> "Q. Well, why did you want to know about the market prices?
>
> "A. So that we could do business intelligently.
>
> "Q. Do you follow the market at all in making your prices?
>
> "A. One has to follow the market when they sell, Mr. Mitchell."

and the Attorney for the Government replied:

> "Well, that was my impression. * * * I am glad that you have the same one I have." (R110.)

Louis M. Leffingwell, of the Northern Linseed Oil Company, testified:

> "Before we became affiliated with the Armstrong Bureau, I, of course, tried to ascertain the prices at which our competitors were sell-

ing their products. One way was through brokers making quotations, and having the customer come back and say that somebody, perhaps mentioning the name, had quoted a lower price than ours. The advantage in getting the information from the Armstrong Bureau was that that information was correct and we could rely upon it." (R111.)

And in addition to what the Government quotes on pages 143-144 of its brief, as the testimony of Mr. Nolan, which is in fact the testimony of Mr. Leffingwell, is added the following:

> "The advantage of joining the bureau was that we got correct information, and by market information, I mean *all subjects* pertaining to the industry that we brought up at these meetings, such as bags, and press cloth, and how we operated everything along manufacturing lines. By the term market condition, I mean everything that pertains to the linseed oil trade." (Italics ours.) (R113.)

This latter statement of Mr. Leffingwell does not at all indicate that his company joined the Armstrong Bureau for the purpose of entering into a conspiracy or combination to artificially affect prices.

The testimony of Mr. Quine of the American Company as to why that company joined the Armstrong Bureau needs no comment except to say that

the statement of the Government in its brief on page 144, that

> "Their pretended claim that such information could have no effect, referring to the information as to what others were doing, is entirely beside the record."

No one has made any statement so far as we can ascertain from the record that information as to what others were doing in the industry was not of some value in the intelligent carrying on of business by members of the industry. The testimony of the defendants in the lower court was to the effect that the market information through the bureau being accurate and reliable, it was of aid in intelligently conducting the business of the individual subscribers. We contend now that it was of benefit for the purpose of placing at the disposal of the subscribers to the Bureau the true conditions pertaining to the flaxseed market and the linseed oil market as rapidly and as often as the information became available through the bureau. The purpose and intent of assisting the individual subscriber to so conduct his business was that wasteful and destructive practices would be guarded against to the end that the buyers and consuming public would be treated in a fair, upright and business-like manner.

And we contend that the entire record throughout shows that the course of conduct of the defendants was at all times pointed in that direction. The market letters referred to in the Government's brief and set out in the record were the result of information both reliable and unreliable coming to the individual subscribers and passing through the bureau in order that practices which were being or might be indulged in contrary to the letter and spirit of the provisions of the contract with the Armstrong Bureau might be eliminated; that the practice of fair dealing toward competitors might be followed; and in those instances referred to in the market letters there is not a single statement or intimation that any subscriber was to regulate his business in accordance with the practices followed by other subscribers or upon the basis of any resolution or recommendation passed at the meetings of the Linseed Oil Council. There is no testimony in the entire record that the Bureau ever had in mind or the subscribers ever intimated, orally or by letter, that each individual crusher was not free at all times to conduct his business as he saw fit if he joined the Armstrong Bureau, or continued to be a subscriber to the services as offered by the bureau in the contract (Government Exhibit 2).

What the individual subscribers had in mind when they joined the Armstrong Bureau, and what they hoped to obtain from the Bureau's service can only be ascertained from their testimony why they joined and what they did after they became members of the bureau. Theories, innuendoes or statements based on suspicion as to why the defendants joined the Bureau have no place in the presentation of this case to the Supreme Court of the United States. The Government and the defendants must stand or fall on the record as now presented to this court, and that we assert with all sincerity we are willing to do. We have not attempted in this brief to present to this court a glorified picture of the services of the Armstrong Bureau to the defendant crushers that is in the far distant fog of obscurity or that is existant only in the mind of a theorist.

All the statistical exhibits offered in the record by the Government with the exception of the one issued by the Bureau of Census (No. 8) were prepared and submitted to the Government not at its requests or demands, but in order that the lower court might have before it the actual bona fide plan and operation of the Armstrong Bureau. This data was prepared by the bureau and given the Government for the reason that the defendants had a firm belief in their own honesty and sincerity of purpose, and desired that all the facts and circum-

stances surrounding the operations of the Armstrong Bureau should be presented to the court, in such a manner that no doubt would exist as to the legality of their activities. In presenting the picture to this honorable court we are actuated by the same sincerity as prompted us in the lower court. We state with all the emphasis at our command that we have endeavored to present our case before this court on the record as it stands, without theories or innuendoes, in the hope that when this court has finally passed upon the entire case, we may feel that nothing has been left undone to show the court that the activities of these defendants were based upon sound economics and lawful purposes.

The Government in the lower Court and in its brief presented to this Court placed much stress on the expression "stabilized market," as used by the Council in advertising matter, Ferry's book, and statements of some of the witnesses, and would have the Court believe that the term means nothing more nor less than "stabilized or uniform prices." If this contention be sound, then the crusher defendants while operating through the Armstrong Bureau fell far short of the mark for the reason that as Government Exhibit 3 will show, there was a competitive spread in the spot prices quoted by the crushers for a period of approxi-

mately two-thirds of the time the Linseed Oil Council was in active operation. The spot competitive spread in price was as great as twenty-seven cents per gallon in a single day, and long after the Council was in operation there were many times when the spot spread was 17 to 19 cents in a single day. The Government's Exhibit 4, Table of Future Quotations, shows even a wider spread in the future prices quoted, for a long period of time the spread in the future price often going above 25 cents a gallon in a single day.

In its brief (page 145) the Government states that "the excuse given by the witnesses, and especially by the experts, for the existence of the bureau, is that it merely 'stabilizes' prices and preserves 'constructive' competition."

This is the first intimation that any representative of the bureau or subscribers had an excuse for the existence of the bureau. From the beginning we have contended and now assert that the service of the bureau was in the interest of a stabilized market, but not "stabilized or uniform prices" brought about by agreement or concert of action on the part of its members. Furthermore, from a reading of the testimony of the representatives of the crusher defendants it is doubtful if any member joined the bureau with the thought in mind that the services of the bureau were to bring

about a stabilized market. It is of record that the crushers joined the bureau primarily to obtain accurate market information, the lack of which they testified worked a hardship in economically and efficiently conducting the linseed oil business. Many definitions of what a stabilized market is were offered by representatives of the crushers, Ferry and Armstrong. From these definitions the Government is attempting to show, and would have the Court believe, that the crushers had in mind "uniform prices." The statements of the crushers, however, as to what a "stabilized market" is, do not support the contentions of the Government, and we assert that the wide spreads in prices quoted by the crushers both for spot and future oil completely defeat the Government's argument. The testimony of Samuel Mairs, of the Archer-Daniels Company, as to a stabilized market is as follows:

* * * * * *

"Q. What do you understand to be a stabilized market?

"A. As I understand it a stabilized market is a market where the demand for linseed oil would not exceed the supply of flaxseed.

"Q. How is a stabilized market brought about in the linseed oil industry? Do you know whether it has ever been brought about?

"A. No; I don't know that it has been

brought about, except—well, a stabilized market—if there is any bigger demand for the oil than for the flaxseed it would tend to keep the market about on the same level.

"Q. If you have accurate information of all the conditions in the industry, the consumption of oil in different portions, the price of the flaxseed, and the conditions of the flax crop, if everyone has that information, does that have a tendency to stabilize the market?

"A. I should judge it would; yes." (R78.)

And on cross-examination he testified that—

"I do not know whether stabilization of prices had anything to do with our interests in the bureau; it might have had. (R80.)

The testimony of William O. Goodrich of the Goodrich Company on stabilization is as follows:

"Q. Do you know of any method by which the exchange of market information through the Armstrong Bureau could in any way lessen competition?

"A. No, sir. If you mean by that it had a tendency to stabilize prices, I must say that I do not think it had the slightest. I do not believe that it is possible to stabilize prices in a business like ours, where there is a wide fluctuation in the raw material, often as much as 50 cents in a day, thereby causing the most erratic changes in value. It is quite impossi-

ble to talk about stabilizing prices. You can not do it; there is no such thing possible." (R97.)

Mr. Hirst of Hirst & Begley, testifying on cross-examination as to the effect the exchange of information through the bureau had on prices, states:

"Q. Now on a rising market—of course in a general way, when the price of flaxseed goes up, the price of linseed oil goes up? Anybody can see that. Now, what was the effect of the exchange of prices through this bureau, when there was a rising flaxseed market? What effect did the exchange of prices through the bureau tend to have on the prices of linseed oil?

"A. I can only answer for myself as to the effect of the interchange of prices on the price of linseed oil during a rising flaxseed market. When I saw the flaxseed market advancing I hedged all my transactions, buying flaxseed as I sold oil so as to keep my tracks covered. We had to use a good deal of discrimination or of judgment to determine whether a rising flaxseed market was speculative or not. If it was a legitimate advance created by a demand for oil or for cake, we then looked for an advance in the linseed oil market.

"Q. Oh, yes, I can quite understand that. That would obtain whether there was a bureau or not?

A. Yes. (R148.)

* * * * * *

"Mr. Mitchell. Now, with that background for my next question; that is, a rising market, for reasons which you would consider profitable, given those tendencies to create, possibly, an advance in the price of oil; now, in connection with that, what would be the effect, speaking now from your observations, when you are a member of this council, and in the business, what would be the effect of this continued interchange of price lists amongst the crushers, through the Armstrong Bureau? Would that have a tendency to help the price of linseed oil up?

"A. Well, I want to be as sensible as I can in my reply.

"Q. Please do.

"A. And if you would suggest the effect that it might have on the market, I would like to say yes or no.

"Q. Yes, I would suggest to you that it did have the effect— * * *

"A. I can answer your question, I think.

"Mr. Mitchell. All right.

"A. So far as I am personally concerned, the interchange of price lists among the crushers would have no effect on me whatever except as I said that as the price of flaxseed advanced I would look for an advance in the price of linseed oil, provided there wasn't an advance in the price of cake in the meantime.

Very frequently an advance in cake will offset any advance in the price of flaxseed without effecting the price of linseed oil.

"The Court. Q. Well, where would you look for this advance? You said that if flaxseed went up you would look for an advance. Now, where would you expect to see it? Inside of your own establishment, or inside of the bureau?

"A. Your Honor, I got practically all of my information from the trade before I got it from the bureau.

"Mr. Mitchell. Q. Now, speaking of your observation, not only of your own business, but what you see reported through the bureau of the prices of all of the crushers, and speaking as a man familiar with the business, did not this interchange of price lists through the bureau have a tendency to help the price of linseed oil up?

"A. It might have done so, as far as the other crushers were concerned, but, Mr. Mitchell, that had no effect on me whatever, and I can only answer for myself." (R.149.)

Mr. Armstrong on cross-examination testified with respect to a stabilized market, as follows:

"* * * I call a stabilized market a market in which competitive prices operate upon the law of supply and demand plus the knowledge of individual costs in the market un-

affected by the wide fluctuations that obtain from misinformation." * * *

"In my ideal a constructive competitive market shown graphically would be a broad band or ribbon right across the chart. That would show a range in price which might be of 10 or 15 cents a gallon. The daily competitive range would be there, but the great high peaks and depressions that are the result of misinformation would be cut out. I do not suggest that it is our idea to produce a range in linseed oil prices of from 10 to 15 cents a gallon, through our operation. It would not be possible to do that. Indeed, we are not aiming to produce a range in prices at any given time. I think that it is doing me an injustice to consider that I said that members should not undersell each other, because that is the history of this business. We are not working together for the purpose of inducing them to undersell one another, but I am working to bring them to a point where they will not take hearsay evidence as indicative of their competition, but they will take the true facts and will meet competition as their business conditions permit." * * * (R144-145.)

From the above it will be seen that the bureau and its members did not have in mind any conspiracy or combination to bring about uniform prices in the linseed oil industry, but were at all

times endeavoring to secure the fullest accurate market information pertaining to the industry for the purpose, and only for the purpose, of intelligently carrying on the business of the respective concerns. The members of the bureau, Ferry and Armstrong, were examined not only by counsel for the Government in the lower Court, but Judge Carpenter also searchingly questioned them with respect to the expression "stabilized market," and below is quoted that portion of his opinion relative thereto:

> "But it is charged by the Government that the defendants themselves claim that the effect of the bureau was to stabilize prices. That is to say, as a result of accurate and instant knowledge on the part of producers, the price of linseed oil instead of varying sharply from day to day, as shown by the sales made, assumed an average price without the deviations. If these deviations before had been the result of real competition, based on accurate knowledge by the producers of the real market conditions, then the Government is far from sustaining its contentions. The defendants, however, have shown, and their evidence is uncontradicted, that the deviations before existing were caused by the individual producers endeavoring to meet prices of their competitors which had never been made; and it is common in the trade for buyers to make

false representations as to the prices made by other producers. Surely, such a condition is not the one that the Sherman Act aims to foster.

"The Government was greatly disturbed by a statement in the Defendant Ferry's books that the Armstrong Bureau brought about a stabilized market. This expression seems to have been a great bugaboo. Counsel for plaintiff would have the court believe that the term 'stabilized market' means nothing other than uniform prices. Whatever the proper definition of the phrase, the record does not show that there was a stabilization or uniformity in prices."

"The defendants contend, and I agree, that the term 'stabilized market' means the obtaining and distributing of any accurate information that would enable crushers and buyers of linseed oil the better to understand the conditions of the flaxseed and oil market, to the end that the speculative hazards which formerly had worked injury to both seller and buyer would be minimized and eventually eliminated, and the economic law of supply and demand be more intelligently put into operation."

FLUCTUATIONS IN FLAXSEED PRICES, REPLACEMENT COSTS AND LINSEED OIL PRICES.

Not only did the defendant crushers testify that the price of linseed oil followed the flaxseed mar-

ket, but buyers of linseed oil, called on behalf of the Government and the defendants, testified to the same effect. The Government, however, would have the court believe that because fluctuations in flaxseed prices were far more frequent and violent than were the fluctuations in the prices of linseed oil, the law of supply and demand was not permitted to function freely by the bureau and its members. There is no evidence in the record, however, to show in what way, if any, the defendants prevented the law of supply and demand from operating freely, unless it be contended that the mere exchange of accurate market information through the bureau was a means adopted to bring about that result. The Government assumes that because prices of a product decline at a slower rate than the decline in the prices of raw material, this result must have been produced through artificial means and by concert of action. We contend, however, that the price of any finished product will decline more slowly than the price of the raw material, for the reason that if there is a supply of finished material on hand, the raw material of which was bought at a higher price, it is natural for the manufacturer to endeavor to dispose of the finished product at prices not predicated on the declining price of raw material, but at prices predicated on the higher cost of raw material which he

has already bought. Until the supply of such finished material is disposed of no decline in price may be expected, particularly if the demand for the finished product is at all normal. Again, if the price of the raw material starts a rapid advance the production of finished material will be lessened, with the result that the price thereof will also rapidly advance. These are economic factors common in other industries. That is why, we assert, Government Exhibit 6 (a chart) shows that at times the market on linseed oil did not always decline as often and as rapidly as the price of flaxseed. On the other hand, we assert that the chart shows that the defendant crushers were selling linseed oil at times when the cost of replacement was greater than the prices quoted, and we would call the court's attention to the fact that this chart was checked by James F. Terry of the Department of Justice and O. K.'d by him as being correct. (R51.)

PUBLICITY.

There is nothing secret about the activities of the bureau in connection with its service to clients. The book entitled "Intelligent Selfishness a Business Builder" (Government Exhibit 13) was widely distributed by the bureau and the Linseed Oil Council to buyers and consumers of oil. All trade journals for the industry carried full-page advertisements telling of the affiliations of the lin-

seed oil crushers with the Armstrong Bureau, and meetings were held in several sections of the United States with buyers and consumers of linseed oil, at which Armstrong or Ferry discussed fully the operations of the bureau and answered all questions put to them with respect thereto.

It is the record that throughout the entire operation of the Linseed Oil Council prices of members were first given to the trade before transmission to the bureau and by it to the other crushers. This at all times placed in the possession of buyers first-hand information as to all changes of prices being made by the respective crushers. It was also testified by buyer witnesses called by the Government that they kept posted on the flaxseed market, and it seems peculiar that if the exchange of price information by the bureau was unreasonably enhancing prices, no evidence was offered by the Government from buyers to this effect.

It is a matter of record, however, that buyers called by the Government and the defendants testified that they thought the prices quoted by the crushers were not out of line with the flaxseed market.

The following are quotations from the record showing some of the methods used by the bureau to advise buyers and consumers of the activities

of the Linseed Oil Council, and letters from buyers in reply thereto:

DEFENDANT'S EXHIBIT 20. (R732.)

The first institution of its kind.

[Lettering on design:] Armstrong Bureau of Related Industries, whose products, manufactured, marketed, and sold in strict accord with a spirit of fairness to employee, competitor, and purchaser, need no greater surety of supreme quality.

WHAT IT DOES.

The Armstrong Bureau of Related Industries, founded on the principle that American business can reach its highest development and perform its greatest service to the Commonwealth only through modern, cooperative methods—renders a professional service by which competitive businesses attain maximum results through cooperation in the following factors:

Organization—

1. Creation of mutual confidence.
2. Development of ideals.
3. Consolidation.

Pertaining to marketing—

1. Statistics—
   (a) Quotations.
   (b) Sales.
   (c) Shipments.
   (d) Production.
   (e) Terms.
2. Credits—
   (a) Reports.
   (b) Collections.

3. Distribution—
   (a) Standardizing channels.
   (b) Establishing bases.
   (c) Salesman education.
   (d) Jobber education.
   (e) Dealer education.
4. Export—
   (a) Markets.
   (b) Selling.
   (c) Tariff.
5. Traffic—
   (a) Classifications.
   (b) Rates.
6. Market development—
   (a) Field survey.
   (b) Organizing channels.
   (c) Merchandising.
   (d) Cooperative advertising.

Pertaining to production—

1. Cost accounting.
2. Product.
3. Material—
   (a) Supply.
   (b) Standardization.
   (c) Cooperative buying.
4. Labor—
   (a) Supply.
   (b) Wages.
   (c) Control.

DEFENDANT'S EXHIBIT 23. (R734.)

(Advertisement.)

ELIMINATION OF UNFAIR COMPETITION AN IMMEDIATE TASK FOR AMERICAN BUSINESS.

A New York manufacturer stated that it is quite common practice for bankers discounting his commercial paper or that of his competitors to call upon him for a statement of business conditions

throughout the industry. It interested him to note their favorable reaction to his statement that through a system of lawful cooperation the industry had fairly stabilized its market and eliminated unfair merchandising practices.

It seems to be definitely proved that such a statement of facts has intimate bearing on the loan rate, and sometimes on the question of whether the paper should be handled at all.

Business prosperity is closely linked with credit, and here we find credit directly influenced by business cooperation.

The prosperity of the individual merchant and manufacturer is directly affected by the prosperity of his fellow merchants and manufacturers; whether they are competitors does not affect the argument.

The manufacturers of linseed oil, who are members of the Linseed Crushers' Industrial Council, through their cooperation, are correcting unsatisfactory conditions in their industry and delivering a substantial service to the public, to their trade, and to themselves.

Users of linseed oil will receive a comprehensive explanation of the cooperative activities of this group of manufacturers by writing for the book, "Intelligent Selfishness a Business Builder." A personal visit to the address below for the same purpose is cordially invited.

Call or write Linseed Crushers' Industrial Council, directed by the Armstrong Bureau of Related Industries, 11 La Salle Street south, Chicago, Ill.

DEFENDANT'S EXHIBIT 24. (R735.)

OUR FORMULA FOR LAWFUL AND CONSTRUCTIVE CO-OPERATION

Business men and the consuming public should recognize that lawful and constructive co-operation has nothing in common with "price fixing."

We believe the future prosperity of American business demands that lawful and constructive co-operation be instituted in all of our industries.

The unfair and unsatisfactory conditions which prevail in an unorganized industry impose an unjust burden upon the manufacturers and the trade of that industry.

No business institution can afford to shirk its share in the necessary co-operative "housecleaning" of its industry.

In an unorganized industry public service results can obtain only in a minor degree, through the unselfish efforts of possibly two or three manufacturers in the industry who have the disposition and power to deliver such results in their individual operations.

Organized under a lawful and constructive co-operative plan, an industry delivers full and complete public service.

The formula for the co-operation of the Linseed Crushers' Industrial Council provides that every feature of our work shall deliver equally at all times a service to the industry, the trade, and the public.

A comprehensive explanation of the co-operative activities of this group of manufacturers may be had by writing for the book "Intelligent Selfishness a Business Builder," which will be sent gratis, or a personal visit for the same purpose is cordially invited.

Address Linseed Crushers' Industrial Council, directed by the Armstrong Bureau of Related Industries, 11 La Salle Street south, Chicago, Illinois.

Publications carrying this advertising:

Paint, Oil & Drug Review.
Painter and Decorator.
Drugs, Oils & Paints.
Oil, Paint & Drug Reporter.
Paint and Varnish Record.
American Paint Journal.

DEFENDANT'S EXHIBIT 22. (R733.)

PRICE DISCRIMINATION.

When a seller gives preferential prices to a few hand-picked buyers, all buyers should drop him like a hot penny. He is a destructive factor in business.

When a seller quotes a fair price uniformly to his entire trade with suitable discounts for quantity, he is fairly serving all buyers and represents a constructive factor in business.

All business consists of buying and selling; the unfairness of price discrimination must be universally recognized, either from a purely selfish standpoint or in the broader sense of its demoralizing effect on American business.

The elimination of "price discrimination" is only one of the constructive accomplishments of the lawful co-operative work of the Linseed Crushers' Industrial Council through the service of the Armstrong Bureau of Related Industries.

These manufacturers of linseed oil are continually working to improve conditions in their industry and increase their service to their trade and to the public.

Users of linseed oil will receive a comprehensive explanation of the co-operative activities of this group of manufacturers by writing for the book "Intelligent Selfishness a Business Builder," or a personal visit for the same purpose is cordially invited.

Call or write Linseed Crushers' Industrial Council, directed by the Armstrong Bureau of Related Industries, 11 La Salle Street south, Chicago, Ill.

DEFENDANT'S EXHIBIT 3. (R682.)

LETTER TO LARGE OIL BUYERS.

[Armstrong Bureau of Related Industries.]

May 13, 1920.

From: Julian Armstrong, Armstrong Bureau of Related Industries.

To: Mr. L. H. Fehsenfeld, General Products Company, Baltimore, Md.

Subject: Co-operation among "sellers" which is of direct service to buyers.

1. In behalf of our clients, the manufacturers of linseed oil—members of the Linseed Crushers' Industrial Council—it is now possible for us to send to you a full and complete explanation of the operations of this service and the co-operative activities of the council.

2. This explanation is accorded through the book "Intelligent Selfishness a Business Builder," a copy of which we are sending to you personally under separate cover.

3. In the minds of progressive business men it is quite evident that if the unsatisfactory conditions which have obtained in the past throughout practically all of our industries are to be corrected we must inaugurate a system of business cooperation soundly based upon a plan which delivers a service alike to buyers, sellers, and to the public.

4. It is unnecessary for us to point out to you that under the old order of things merchandising practices have developed which are against the interests of both buyer and seller, as for instance price discrimination, where a seller makes special preferential prices to one buyer without extending those prices to the rest of his trade.

5. Again, we have instances where blind, destructive competition so depressed prices as to at less than cost. Naturally, through such an order of things service to the buyer and quality of product are necessarily lost sight of.

6. In all of its operations and its service to various industries, the Armstrong Bureau is carrying on an extensive campaign of publicity whereby its service and the operations of its clients can be clearly presented to their trade and to the public, and we unhesitatingly assure you that in all of these operations there is a concrete and clearly defined service to the public and to the trade, and we believe without that result it would be difficult to prove that co-operation is sound and constructive.

7. It is of record that adverse comments by buyers have been made only where there has been a lack of knowledge or understanding of this co-operative work.

8. The bureau and the Linseed Crushers' Industrial Council will be much interested in your comments upon this matter after you have read the

book above referred to. As Mr. Burleson's mail delivery seems a bit uncertain these days, we shall appreciate your prompt acknowledgment of its receipt upon the postcard enclosed for that purpose.

(Signed) JULIAN ARMSTRONG.

Steelcote Mfg. Company, St. Louis, Mo.
J. C. Settle & Company, St. Louis, Mo.
A. O. Wheeler Company, Pittsburg, Kansas.
F. O'Brien Varnish Works, Los Angeles, Calif.
Mechanics Paint Company, St. Louis, Mo.
George A. Johnson Company, Seattle, Wash.
Scrion & Duinn, Los Angeles, Calif.
Burgner-Bowman Lumber Co., Kansas City, Mo.
Peter Vredenburgh Lumber Co., Springfield, Ill.
J. W. Merriman, Seattle, Wash.
Hirshberg Paint Company, Baltimore, Maryland.
Hanline Brothers, Baltimore, Maryland.
Miller & Graham, Baltimore, Maryland.
Gandy Belting Company, Baltimore, Maryland.
H. B. Davis Company, Baltimore, Maryland.
Hugh Reilly Company, Washington, D. C.
P. A. & S. Small Company, York, Pa.
S. M. Bloom & Company, Hagerstown, Maryland.
W. D. Byron & Sons, Inc., Williamsport, Md.
W. H. Butler Company, Washington, D. C.
L. H. Friedman, Seattle, Wash.
William Rademacher, Winona, Minn.
Heath & Milligan, Chicago, Illinois.
T. B. McDonald, San Diego, Calif.

McPhee & McGinnity Company, Denver, Colo.
Standard Textile Products Company, Rock Island, Illinois.
Attastic Pt. Mfg. Co., Minneapolis, Minn.
Bennett Glass & Paint Company, Salt Lake City, Utah.
C. H. O'Neil & Sons, Milwaukee, Wis.
Penna Consumers Oil, Council Bluffs, Iowa.
J. I. Porter, Stuttgart, Ark.
Preservative Pt. Company, Seattle, Wash.
J. S. Rogers & Company, Pittsburg, Kansas.
Sillers Varnish Company, Los Angeles, Calif.
St. Paul White Lead & Oil Works, St. Paul, Minn.
Tacoma Paint & Wallpaper Co., Tacoma, Wash.
Brinninstool Company, Los Angeles, Calif.
California Glass & Paint Company, Los Angeles, Calif.
Cook Paint & Varnish Company, Kansas City, Mo.
Farwell, Ozmun Kirk Company, St. Paul, Minn.
Great Western Paint Mfg. Company, Kansas City, Mo.
Hackett Gates Hurty Company, St. Paul, Minn.
Jones-Moore Paint House, San Diego, Calif.
James Butte Company, Houston, Texas.
McMurtry Mfg. Company, Denver, Colo.
Thoma & Son, Fairfield, Iowa.
Nelson Evans Paint Company, Omaha, Nebraska.
T. C. Esser Company, Milwaukee, Wis.
Blish Mize & Silliman, Atchison, Kansas.

Martin-Senour Company, Lincoln, Nebraska.
Patton Paint Company, Milwaukee, Wis.
National Waterproofing Company, Memphis, Tenn.
Los Angeles Wallpaper & Paint Company, Los Angeles, Calif.
Matthews Paint Company, Los Angeles, Calif.
Northern Hardware Supply Company, Menominee, Wis.
Noyes Brothers & Cutler, St. Paul, Minn.
Talbert Whitmore Co., Los Angeles, Calif.
Fairbanks Morse & Company, Chicago, Illinois.
Sears Roebuck & Company, Chicago, Illinois.
American Radiator Company, Buffalo, N. Y.
Cataract Refining & Mfg. Company, Buffalo, N. Y.
Henry Boardman, St. Louis, Mo.
A. Andren, Duluth, Minn.
Cont Oil Company, Denver, Colo.
Oakley Paint Company, Los Angeles, Calif.
Simmons Hardware Company, St. Louis, Mo.
Bradley-Wise Paint Company, Los Angeles, Calif.
A. B. Fosseen Company, Yakima, Wash.
W. P. Fuller & Company, San Francisco, Calif.
Rasmussen & Company, Portland, Ore.
Strowbridge Hardware & Paint Co., Portland, Ore.
Whiton Hardware Company, Seattle, Wash.
A. S. Johnson & Company, Tacoma, Wash.
Lion Varnish Company, Seattle, Wash.
Solastic Paint Company, Seattle, Wash.

Sunset Paint Company, Los Angeles, Calif.
Pacific Net & Twine Co., Seattle, Wash.
Bass Heuter Paint Co., San Francisco, Calif.
Pioneer Paint Company, Portland, Ore.
William Curtis Hdwe. Company, Seattle, Wash.
Foster & Klieser, Inc., Seattle, Wash.
Hickox Crampston Paint Co., Tacoma, Wash.

"Market Letter No. 1274—Flaxseed Crushing Industry—February 10, 1920

"ANOTHER ENDORSEMENT OF THE COUNCIL'S WORK BY A LARGE CONSUMER

"The writer believes that the council will be interested in the statement of one of the largest stockholders in the Glidden Company personally made to him today, to the effect that this individual was glad to hear that there would be no dissolution of the council because of the resignation of Spencer, Kellogg & Sons, Inc., which had been reported to him through the trade.

"This gentleman went on to state that as a buyer of linseed oil the stabilized market effected by the co-operative work of the council had been of very direct benefit to his company.

"These personal expressions, as already reported, have been pretty substantially duplicated by other large buyers of oil.

"JULIAN ARMSTRONG."

(R594-595.)

Louisville, Ky., April 14, 1920.

"LINSEED CRUSHERS' INDUSTRIAL COUNCIL,
11 La Salle Street, south, Chicago, Ill.

"Gentlemen: Have noted in the April issue of the American Paint Journal your statement as to the quoting and selling of linseed oil as directed by the Armstrong Bureau.

"Would appreciate if you send to the writer the book 'Intelligent Selfishness a Business Builder.'

"The writer handles the linseed oil for this concern and am very much interested in the work of the bureau, which has been a factor in the stabilizing of business.

"We regret to learn, however, that Spencer Kellogg & Sons have withdrawn.

"Thanking you in advance for your kind attention, we remain,

"Your friends,

"PEASLEY GAULBERT CO.,
(Sgd.) "C. WATKINS."

(R766.)

"Richmond, Va., May 18, 1920.

"ARMSTRONG BUREAU OF RELATED INDUSTRIES,
Chicago.

"Gentlemen: We acknowledge receipt of the book 'Intelligent Selfishness a Business Builder,'

and beg to thank you for having sent same to us. The contents of this book are well worth the serious reflection of every business man, and I shall see to it that those connected with this concern in positions of responsibility have the opportunity of reading same. I am sure the book will do good and be of much benefit to the trade generally.

"Again thanking you for sending it to us, we are

"Yours very truly,

"HARWOOD BROS., INC.,

(Sgd.) "W. T. SHEPHERD,

"Vice President."

(R767.)

"New York, May 21, 1920.

"ARMSTRONG BUREAU OF RELATED INDUSTRIES,
Chicago.

"Gentlemen: The book referred to in your letter of May 14th has just reached us and the writer will take the first opportunity to read all the chapters. We are heartily in sympathy with your aims and while many manufacturers may not feel like going to the limits advocated, we feel that they will do so when they are made to realize that intelligent selfishness is an aid to business.

"Yours very truly,

(R767.) "TOCH BROTHERS."

"East Boston, Mass., May 26, 1920.

"ARMSTRONG BUREAU OF RELATED INDUSTRIES,
Chicago.

"Gentlemen: The book 'Intelligent Selfishness a Business Builder' was glanced over in a casual manner upon receipt and laid aside for more careful reading, which accounts for the delay in acknowledging your letter of May 12th.

"The principles covered in your book are certainly interesting and the opportunity for cooperation along the lines indicated seem broad, with results that should certainly be desirable all around.

"The writer is under obligations to you for the opportunity of becoming acquainted with your plan.

"Very truly yours,
"ACME WHITE LEAD AND COLOR WORKS,
(Signed) "C. J. LANDEN."

ARGUMENT

At the beginning of the Government's argument (page 155 of its brief) it contends:

> (1) That the purpose of the combination between the defendants was to eliminate competition between the defendant manufacturers as to prices and practices by—
>
> (a) Making uniform the practices incident to the marketing of their products.

(b) Continually keeping each other informed as to their prices.

(c) Subjecting themselves to a searching examination as to every transaction.

(2) That the necessary result of the operation of the system was:

(d) A very substantial increase in the prices of linseed oil over what they would have been had the naturally competitive conditions continued.

(3) That the evidence conclusively shows:

(e) That the intended and natural result of the system was fully accomplished.

At the outset we deny that there is any evidence that a combination of any kind existed between the defendants to bring about any unlawful result in the linseed oil industry.

We will now take up the contentions of the Government set forth above.

(1) The elimination of competition as to prices and practices.

John A. Mann, a defendant crusher, testified:

"* * * There was never any arrangement or agreement or obligation on my part due to affiliation with the Armstrong Bureau to confine my business to any particular territory. We were perfectly free to sell anywhere we wanted on the face of the earth. There was never any suggestion hinted that we or

anyone else in the industry should curtail production, or any intimation, arrangement, or agreement that there should be any lessening of competition at any time. There was not at any time any lessening of competition. The state of competition during the existence of the Armstrong Bureau was just the same as compared with the time previous to my affiliation with it. Along in 1918 there wasn't as much linseed oil produced, because we couldn't get the labor and the raw materials to produce it." (R72.)

On cross-examination Mr. Mann testified:

"It was not practical for us to send oil to Chicago. We were too far away from it and the prices here were such that it was not to our interest to sell in Chicago. * * * We sold in zone 2 and do sell in zone 2 now. My explanation is that we would meet competition in that zone to get business wherever it was or even go lower." (R73.)

George F. O'Neil, a buyer, testified:

"As quotations came to me I entered them in a list and kept that from time to time for reference." (R73.)

This list was offered in evidence as Defendant's Exhibit 1. (R676.)

Mr. O'Neil further testified:

"Q. I want to ask you this: What does it show generally as to competition?

"A. Why, it shows a difference in prices from the different ones on the same date in a great many instances, and in some instances the difference is much greater than others. In some instances there is probably no difference.

* * * * * *

"My recollection is that there was a difference in the different quotations for linseed oil after October, 1918, just the same as before that date." * * * (R74.)

It is significant that the cross-examination of this witness by the Government was very brief and entirely unrelated to the question of prices or competition. (See R75.)

Samuel Mairs, of the Archer Daniels Linseed Company, testified as follows:

"Q. Where you sell to a man, for instance, in zone 6, who is immediately beyond the line of zone 6, what arrangement do you make with him?

"A. We would sell to him at our zone one price, any price that would be cheaper to him." (R79.)

William O. Goodrich, President of the Goodrich Company, testified:

"I, in fact, always competed while affiliated with the Armstrong Bureau, the same as I competed previously or afterwards. * * *

> When there is a prospective customer who I think would be an advantageous customer, I usually try to quote him a price that will sell him. * * *" (R94.)

On cross-examination, Mr. Goodrich testified:

> "The Philadelphia incident was not the only transaction where I undersold my competitors. I needed money, or I would not have made the price, but I did that very frequently. When I had the stock and needed the money I made the price that would give me the customer, and what anybody else's price was had no bearing on the question." (R99.)

Goodrich further testified that when he purchased Argentine seed and shipped it to New York from Milwaukee—

> "It really resulted in cutting me out entirely in the eastern market. I was no longer able to compete, but it was quite right that New York should be made the base." (R96.)

Could a more frank and honest statement be made as to competition between the defendant crushers?

Daniel A. Murphy, a buyer, testified:

> "Q. Were the quotations as you obtained them after September, 1918, always the same?
> "A. No, sir; * * *.

"Q. Did that state of affairs indicate to your mind that there was active competition in the market between the crushers for your business?

"A. Yes." (R102-103.)

There was no cross-examination of this witness as to competition.

John E. Thomas, a buyer, testified:

"Q. State whether or not you found any difference in the quoting of prices to you during the regime of the Linseed Oil Council and prior thereto, and subsequent thereto? Was there any material difference between the quotations—that is, as to spread?

"A. No, not very—there was no material difference. * * *

"Q. Will you state now, from your experience as a buyer over many years, whether or not the operation of the Linseed Oil Council under the Armstrong Bureau worked an unfair burden upon you as a buyer?

"A. I do not feel that it did." (R104.)

No cross-examination at all of this witness appears in the record.

George A. Martin, representing the Sherwin-Williams Company, manufacturers of dyes, insecticides, paints, varnishes, and other things, and crushers of linseed oil, testified:

> "We sell very little linseed oil to the large consumers or to the same class of trade as the other crushers." (R104.)

Mr. Martin testified that his company had a producing capacity of about 30 or 40% of their requirements (R104), and that his company was among the largest buyers of linseed oil in the country. (R105.) Does it seem plausible that under such circumstances this company would have entered into a combination or conspiracy to enhance or retard the lowering of prices of linseed oil?

Herbert L. Baumgardner, a buyer, testified on cross-examination by the Government that:

> "Before the Armstrong Bureau was formed we found fluctuations in prices from time to time as we inquired for them, and we found changes in prices after the bureau was formed. We did not find that the market was somewhat more stable after October 19, 1918." (R108.)

F. Carlton Smith, manager of the Oil Department of the Minnesota Linseed Oil Company, testified that:

> "There never was any attempt on my part at any time to follow the leadership in the market of any other crushers." (R108.)

"We sometimes cut prices to meet competition when we might want to sell oil." (R109.)

No cross-examination of this witness as to agreed competition appears in the record.

Louis N. Leffingwell, a crusher, testified:

"Q. Do you sell your product in all zones of the United States?

"A. No, we do not. * * *

"Q. Why is that?

"A. On account of the freight rate being higher, we are not in a position to compete with the Eastern mills that crush Argentine seed as a usual thing." (R111.)

Frederick K. Quine, sales manager of the American Linseed Oil Company, testified that:

"We many times cut under the prices that were quoted by our competitors, our position in that respect depending entirely upon the ordinary market position with relation to the amount of oil which we had on hand for sale, or the amount of oil we had for future delivery." * * * (R115-116.)

(a) Making uniform the practices incident to the marketing of their products.

We assume from this statement that the Government is referring to zone differentials and terms of sale.

John A. Mann testified that the zone differentials were adopted by the bureau before he joined, but that his company had had substantially the same practice for years, and "we could change them at any time we saw fit." (R71.)

Mr. Mann also testified that during the years that he had been in the linseed oil business the terms of sale had been thirty days net, or 1 per cent off in ten days, and that he did not think his company ever received trade acceptances more than two or three times since it had been in business, and "then, it was simply granting the buyers' request." (R72.)

Mr. Goodrich testified that for the last twenty years the terms of sale had been thirty days and 1 per cent off for cash in ten days, and that such conditions of sale were not any different during the period of the operation of the bureau than they were at other times; that "there were some recommendations made with reference to trade acceptances. I never tried to impose them on any of my customers." * * * We are still using trade acceptances in probably 75 per cent of our business which is not discounted for cash." (R94-95.)

On cross-examination Mr. Mann testified:

> "There was not to my knowledge a resolution doing away with the fraction of the cent, but I would not deny it if it appeared in

> the minutes of the meetings. I actually quoted fractions of a cent during the operation of the bureau. (R97.)

Mr. Quine testified that the terms of sale for linseed oil have been thirty days net and 1 per cent off for cash in ten days; that the bureau suggested and he attempted to put in a change of terms which was thirty days net and 1 per cent off for cash in ten days to net cash terms, but he did not think the terms were at any time universally applied for the reason that it was impossible to do so; that his company has used trade acceptances and the bureau's service did not change that in any way. (R116-117.)

(b) By continuously keeping each other informed as to their prices.

We make no denial of the fact that during the operations of the Linseed Oil Council there was bulletined through the bureau information as to the prices quoted by the respective defendant crushers, but only after such price quotations had been given to the trade. We assert, however, and the record shows, that this exchange of quotations, which related solely to past transactions, was not for the purpose, nor had the effect, of artificially enhancing, fixing or retarding the lowering of any price that had been filed with, and bulletined through, the bureau, or any other price.

(c) Subjecting themselves to a searching examination as to every transaction.

This contention, we assert, is entirely unsupported by the record and has been fully covered in other portions of this brief.

2. That the necessary result of the operation of the system was:

(d) A very substantial increase in the prices of linseed oil over what they would have been had the naturally competitive conditions continued.

We feel that this court will take judicial notice that at the time the Linseed Oil Council was functioning through the Armstrong Bureau the prices of practically all commodities had arisen to, or were approaching, the peak of high prices. Further, we assert that the statistical data in the record shows that the prices quoted by the defendant crushers were on a parity with the prices of flaxseed; that the prices quoted for linseed oil at times was less than the cost of replacement, not taking into account administrative and executive costs.

We further assert that there is nothing in the record to prove that the price of linseed oil would not have gone very much higher if the defendant crushers had not been receiving intelligent accu-

rate market information through the Bureau, but there is evidence to the effect, and offered by witnesses testifying for the Government, that the price of linseed oil did not seem to be out of line with the price of flaxseed. In this connection, we call the court's attention to the fact that throughout the entire proceedings in the lower court no evidence was adduced by the Government nor attempt made by it to offer any testimony to the effect that the defendant crushers had made unreasonable profits during the period of the existence of the linseed oil council, nor is there any record at all that they made even a fair profit from the finished product.

3. That the evidence conclusively shows:

(e) That the intended and natural result of the system was fully accomplished.

If the Government means by this contention that the exchange of market information to the defendant crushers by the bureau artificially affected prices, or tended to an agreement to artificially affect prices, we assert that the record does not substantiate any such contention. Further, to indicate that there was no evidence to support the contention or insinuation of the Government in its brief, that the exchange of this market informa-

tion was a plan to affect prices to be quoted by the defendant crushers, we quote below a statement of Judge Carpenter appearing at page 871 of the record in the lower court, wherein he said:

> "Now, there certainly can be no real point in this case with reference to this acting in the future or in the past, because so far as the contract of the parties is concerned it had to do with the past alone, and that has not been disputed. Everything that has to do with the future is a matter of possibility, and that you are now attempting to reach by way of deduction from the evidence; but we have no evidence that these men agreed to do something in the future.

To which Counsel for the Government replied:

> Mr. Mitchell: "Oh, yes, your Honor. We have no evidence that they agreed to adhere to uniform prices in the future. I make no suggestions of that kind, but the fact is that they entered into a contract—take the contract itself—."

Ralph P. Bolton, President of the Ankeney Company, testified:

> "Whenever I saw a profit on reproductive value of the seed I fixed a price to move the oil. I have at times cut below the prices filed by the other crushers." (R124.)

On cross-examination he testified:

"I never attempted to follow the market. I followed the flaxseed market. I was out to sell oil at a profit whenever I could do so on the flax market. I had no idea what any competitor was going to charge at the time our buyers got our prices, as the prices could change in ten minutes." (R124.)

Charles T. Nolan, manager of the Flaxseed and Linseed Oil department of the National Lead Company, testified:

"I purchased about 35,000 barrels of linseed oil a year for the company and the company crushes about 70,000 barrels and consumes about 50,000 or 55,000 barrels. As a large consumer of linseed oil we would be interested in any plan that would lower prices to the point, and only to the point, where it would not discourage producers of flaxseed in the United States and Canada. * * *. In my purchases of linseed oil I find a variation of prices right along." (R126.)

From the above it is evident that the National Lead Company was not a competitor of the crushers in the usual sense of the term, but was a large buyer and consumer of linseed oil. In view of this it does not seem reasonable that the National Lead Company or its representatives would have been a party to any conspiracy or combination to enhance prices or retard the lowering of prices.

The same observation applies to the Sherwin-Williams Company, identified in the record as a large buyer of oil, who could not logically or profitably engage in any plan to enhance or retard the lowering of prices for linseed oil.

J. W. Hirst of Hirst & Begley testified that

> "I have an idea that I sell about seventy-five per cent of the oil that is used around Chicago, and I keep that trade and make my sales in competition with the other crushers. (R147.)

That there was competition at all times between the other crushers and Hirst & Begley in and about Chicago is evidenced by the testimony of William Hoch, buyer of linseed oil for the Sears-Roebuck Company, who testified:

> "I have a working agreement with Hirst & Begley * * * He [Mr. Hirst] would always figure a lower price to me on account of the quantities that I bought. * * *" (R53.)

That the competition for the business of Sears, Roebuck Company was very keen between Hirst & Begley, the Goodrich Company and the Midland Company, during the time these concerns were members of the linseed oil council, is further set forth elsewhere in this brief.

In answer to a question by Mr. Mitchell, Counsel for the Government, as to whether the furnishing

of price lists through the bureau had a tendency to help the price of linseed oil up, Mr. Hirst testified:

> "It might have done so, as far as the other crushers were concerned, but Mr. Mitchell, that had no effect on me whatever, and I can only answer for myself." (R149.)

At the beginning of its argument on page 156 of its brief the Government states that "a brief recapitulation of some of the things done and incidental results accomplished in the working of the system will be helpful in estimating what was the combined effect of all of its activities."

It then goes on in its brief down to page 167, and again refers to what it considers are instances and practices brought about by agreement or concert of action in violation of the Sherman Law. At this point we again ask the indulgence of the Court for what must seem to it an unnecessarily long brief in reply to that of the Government, but its "brief recapitulation" contains so many statements not supported by the record that we feel impelled to again make specific reply thereto.

The Government at page 156 of its brief said:

> " * * * It can be plausibly argued that there was no specific agreement that the members or any number of them would sell at any time at a stipulated price. But the evi-

> dence does not admit of a doubt that the control and increase of prices so that a greater profit could be realized was the prime object of the organization, and was the actual result of its operation."

If there is any evidence in the entire record, doubtful or otherwise, that supports the above statement, the Government has failed to make specific mention of it in its brief, and it must have been overlooked by the Judge in the lower court.

The Government states (page 156):

> "The requirements with reference to statistics constitute the basis upon which the system rests."

Whatever requirements pertained to the operation of the bureau and its service to its clients are fully set forth in the service contract (Government Exhibit 1a, R169) and it speaks for itself. The Government takes the position that the quoting of prices to the trade and thereafter filing same with the bureau was not a past transaction but had to do with the future. Of course, quotations made to the trade are for the purpose of obtaining sales in the future, but the quoting of a price is a past transaction and carries with it no assurance that a higher or lower price would not be quoted immediately thereafter. See testimony of Mr. Mairs, of the Archer-Daniels Company, wherein he said,

"We could change our price every five minutes if we wanted to." (R81.)

When in its brief (pages 157-158) the Government attempts to draw conclusions from the service contract provisions covering the reporting and exchange of market information through the bureau it is evident that it has misread or purposely misunderstood those operations.

The Government at page 157 of its brief asks, "Why were they [the subscribers] required to report all cuts in prices, and not required to report sales in excess of those given in the price list?" The Government attempts to answer this question by saying "it was because they [the subscribers] were specially concerned in preventing the cutting of prices, while it was quite proper in their minds, to sell above the filed price."

It is beyond our imagination how a crusher could make sales at prices in excess of his quotations made to the trade.

The contention of the Government is not a statement of fact, as will be seen by the provisions of the service contract. (R175-176-177.)

All sales by each subscriber of oil, cake or meal and *all price information* covering his operations, be such prices up or down from his "last filed price list" with the Bureau, were reported by him to the bureau in one form or another after such action

had taken place, in accordance with the provisions of the service contract.

As the Government states in quoting from the service contract, a subscriber was required to report by wire and confirm by mail all quotations made at a variance from his last reported prices, if these quotations gave *better terms* to the prospective purchaser.

If such price revision downward, however, resulted in changing his price list to his entire trade, he merely wired advice of such changed list to the bureau and confirmed it by mail with a copy of that list. If, however, he quoted a price lower than his last reported operations, and did not then revise his price list and file it with the bureau as the contract required, how could such competitive market information be cleared and identified through the bureau except by giving the details of such quotation or sale, as required by the contract. (R176 "C" and "D.")

Any revisions *upward* in a subscriber's price list were required to be reported promptly to the bureau under provisions of the contract. (R176-"E.")

As pointed out elsewhere in this brief the council recommended that as the practice of quoting a special price to a favored buyer was an unfair trade practice in violation of Section 2 of the Clay-

ton Act (another Anti-trust Act), a special price when quoted to a favored buyer should at once apply to the particular crusher's entire trade. The practice of giving special prices to favored buyers has been many times condemned by the Federal Trade Commission, and orders to cease and desist from the use of such practice have been issued by that Governmental agency. Surely the activities of the bureau and its members to eliminate the practice of price discrimination is not indicative of a combination or conspiracy to unlawfully restrain trade and commerce. The record shows that no action was ever taken by the bureau or its members to prevent any crusher from making sales at prices lower than he had filed with the bureau, and that such special prices were quoted and sales made thereunder is shown by the testimony of William O. Goodrich in reference to a sale at a greatly reduced price to a concern in Philadelphia. (R94.) In this particular instance Goodrich did all that was required of him by the bureau and that was to report the special sale with his price to the bureau. We would call to the court's mind that this special sale was at a cut of nine cents per gallon off of Goodrich's filed price with the bureau, and that he testified that he never was criticised in any way for this transaction, and we assert that neither Armstrong, as head of the

bureau, nor any other subscriber, had the right to criticise or attempt to prevent Goodrich or any other crusher from following the same course of action with respect to his own business just so long as the terms of the bureau's contract were complied with.

It is a well-known fact that special prices to a favored buyer are in most cases made for the purpose of secretly obtaining and retaining the business of a competitor, and that usually a seller indulging in such a practice knowing that he is doing something that will bring upon him the reproach of his fellow competitors, whether in or out of an organization, plies such trade secretly in the hope that he will not be discovered. And why? Because he is ashamed of his conduct. If any member of the Council wanted to quote a special price to a favored buyer he could do so by simply reporting thereafter what he had done, just as Goodrich did, and under his service contract, neither the bureau nor the other subscribers could say nay to his action. The Department of Justice itself in its attacks on great trusts and monopolies has many times in this very court condemned the practice of special prices to favored buyers, and is it not inconsistent for a representative of that Department of the Government to be now contending in this court that because these crushers and

the bureau did not favor special prices to favored buyers, but did not agree directly or indirectly, to prevent any one from quoting such prices, and that such a fact tended to prove that these defendants were engaged in a combination and conspiracy to restrain trade and commerce? Will this court say to these defendants that we find that Judge Carpenter did violence to the evidence in the lower court and that we have come to this opinion by reason of the fact among others, that you defendants disapproved of discriminatory prices and that by openly and above-board stating to each other that you disapproved of such a trade practice, you were saying to each other, indirectly it is true, we will not quote special prices to favored buyers because it will have the effect of keeping us from putting our prices higher. We assert that is exactly what the Government would have this court say with respect to that part of the bureau's service contract which relates to the reporting of special prices to favored buyers.

Daily reports of carload sales were filed with the bureau and by it bulletined to its members. While this report shows the activity of business we call attention of the court to the fact that never did the Bureau or any of its members accompany any report of daily sales with any statement that prices ought to be higher, uniform, or lower, or that production on hand or in sight was such as

to warrant any revision either up or down in prices quoted by the respective members. All the bureau ever did with the daily sales reports was to send them to its members without any comment, marketwise, or otherwise. The weekly sales reports covering all sales regardless of size were received and bulletined in the same manner as the daily sales reports and again without comment thereon by anyone.

The Government at page 159 of its brief again makes the unwarranted statement that the Archer-Daniels Company was required to "report contemplated cuts in price before the reduced quotations were actually made." We assert that there is nothing in the record to the effect that any crusher was required to report quotations to the Bureau before the same were given to the trade. Mr. Mairs of the Archer-Daniels Company, with respect to his company filing quotations with the Bureau, testified as follows:

> "I have never to my knowledge sent price information to the Bureau which had not already been quoted to our trade. The statement in the telegram (Plaintiff's Exhibit 17) 'from 17 Nov. wired bureau before wiring agents at bureau's request 10 minutes' means that we wired the bureau ten minutes before we wired our quoted price to our agents." (R102.)

And on cross-examination by Counsel for the Government, Mr. Mairs testified:

> "The third sentence in the telegram (Plaintiff's Exhibit 17) means that we quoted a price and then wired the bureau and after that advised our agents of our quoted price. It does not refer to special sales." (R102.)

Nowhere in the record was Mairs' testimony contradicted and it stands as a complete refutation of the Government's statement in its brief that quotations were filed with the Bureau before the same were actually made to the trade. This is the second inaccurate reference to this matter by the Government in its brief, and we feel that such a procedure on its part is unfair, and can only be justified, if justified at all, by the exigencies of the Government's position in this case.

The Government states that the exchange of information as to every cut in price was to prevent such cuts. This is only an opinion of the Government entirely unsupported by the record. Of course, it is not possible in the mind of the Government that the exchange of information by the Bureau as to cut prices would reduce prices. We assert that the exchange of information that subscribers had cut prices, certainly would have a greater tendency, if it had any tendency at all, to at least prevent prices going higher than were at

that time being quoted by the respective crushers.

The Government in its brief takes exception to the action of the bureau urging a member to show a spirit of independence by giving no attention to a competitor's price, but selling strictly at his own. It is very difficult to reconcile the position of the Government with respect to its attitude in this connection, and its attitude that the exchange of price quotations by the bureau had the inevitable result of making the crushers follow such quotations whether the same were based on the law of supply and demand or not.

The instance referred to at page 159 of Government's brief was a case where information came to the bureau that a subscriber had quoted a special price because he had been told by the buyer that a competitor had offered to sell him oil at a cut price, and the bureau in a letter to the crusher making the sale, stated that if the service of the bureau was being used to simply do as the other fellow was doing, then its service was being used contrary to the purpose for which it was intended.

Under the service contract all that a seller had to do in this instance was to make the sale at a lower price and thereafter advise the bureau without any comment as to what any other member of the bureau was doing. No member of the Council

is required by the bureau or the other subscribers to make any apologies or offer any excuses for any price he may quote, any terms of sale he may give to a buyer, or any freight differentials he may put into effect, just so long as he complies with the service contract and reports it to the bureau.

Nowhere in the record is there any evidence that a member was requested to open for inspection any of his books or accounts to any representative of the Bureau or subscriber.

On page 160 of its brief the Government states that frequent use was made by the bureau of a requirement that a subscriber should reply specifically to any inquiry that might be made through the bureau by another member, and that by such a requirement, maintenance of prices filed with the bureau was brought about. We unqualifiedly assert that this is the most unwarranted statement as to the facts appearing in the Government's brief. The whole record teems with proof that filed quotations were never maintained in any way except by the individual's own freedom of action; that prices of the individual members went up and came down continuously throughout the operation of the Council through the bureau and that for a period of over one year of the year and three-quarters the council was operating, prices of the various crushers varied. Further, the main con-

tention of the Government itself disproves the unwarranted statement referred to above because the prime contention of the Government in this case is that the dissemination through the Bureau of market information and the bulletining of the market letters was for the purpose of enhancing prices. And we assert that the Government surely cannot successfully contend that inquiries sent out by the Bureau had the effect or were intended to maintain prices already on file with the bureau because if such is its contention, where did the maintenance of filed prices begin? It is a matter of record that prices were filed by the various crushers times without number, sometimes up, and sometimes down, and if there ever was anything in the minds of Armstrong or these subscribers that inquiries bulletined to members were to maintain filed prices, we assert with all the emphasis at our command, that the opposite result was accomplished.

The Government states in its brief that "at the very beginning of the organization, by exchange of views through the bureau, fluctuations in the price of linseed oil were very quickly and materially reduced, and the prices of all the members soon became practically uniform." In reply to this statement, we say that the record shows that there never was any "exchange of views" through the bureau, or out of the bureau by these defendants

with respect to prices; that while the prices of all the members at times were uniform, they were for the most part fluctuating; that uniform periods in the linseed oil industry have been occurring since "the memory of man runneth not to the contrary," are occurring now and will occur in the future.

The Government states that on November 9, 1918, one member by writing the bureau secured the reprimand of an agent of another for selling two barrels of oil at $1.53 when that member's filed price was $1.58. The record shows that the bureau simply requested members to advise the bureau whether such a sale had been made, and there is nothing in the record appearing thereafter that the bureau ever did anything beyond the inquiry. We challenge the statement of the Government in this respect and assert that there is no foundation in fact for the same.

On the same page the Government states that "in the same manner a reprimand of an agent of another member was obtained for quoting a price f. o. b., St. Louis, instead of four cents higher, f. o. b., New Orleans." This again, we assert, is an unwarranted statement not supported by the record. The agent in this transaction was never reprimanded; and there is nothing in the record to the effect that he was reprimanded. All the bureau

ever did in this matter was to send out an inquiry, got the replies, and bulletined the same to the subscribers.

On the same page the Government states "in like manner an agent at St. Louis was stopped from selling a few small orders to meet what he was informed was the actual price of a competitor." The Government in its brief does not state who stopped the agent at St. Louis from making sales to meet what he was informed was the actual price of a competitor, but we assert that if the agent was stopped, he was stopped by the only person who could have stopped him, to-wit: the party for whom he was selling oil. Is there anything in this record to show that the bureau or other subscribers in any way stopped an agent of a crusher from selling oil at any price or for any reason? It seems unfair that the Government should resort to the use of a transaction wholly outside of the question involved in this case, which can only have the effect, if it has any effect at all, of clouding the issue.

The Government states (page 161) that it appears from a letter to the bureau from the Midland Company that the council had decided to use the price of oil in barrels, carload lots, as the basic price. What this has to do with combinations or conspiracies in restraint of trade, we do not know.

The Government states, on page 161 of its brief, that through correspondence an understanding was procured that a subscriber would not sell one day at the prevailing price with the understanding that the order would not be turned in for forty-eight hours; the purchaser to get the benefit of a reduction but not charged with an advance; and would not for a premium of one cent per gallon protect a purchaser for thirty days against decline as to any undelivered portion. In reply to this assertion that an understanding was procured, we respectfully request the court to read market letter number 226, beginning on page 391 and ending on page 393 of the record, and we assert that if there is a scintilla of evidence in such correspondence that in any ways shows that "an understanding" of any kind "was procured" we would like to have it pointed out. Because after reading this correspondence over many times we are unable to spell out of it any understanding or agreement of any kind. What the correspondence does in fact show is that a sharp buyer was trying to revive a practice which had been dead for many years, but none of the crushers would have anything to do with reviving the dead, and their attitude thereto clearly was not brought about by any correspondence with the bureau, because as the correspondence shows (R301-393) each individual crusher had decided

for himself and only for himself, that such a practice referred to in the correspondence had no place in his method of doing business.

On page 161 of its brief the Government states that on complaint, two members stopped selling oil in Washington at their Baltimore prices and thereafter added freight between the two points. Nothing appears in the record that any one prevented members of the bureau from selling oil in Washington at their Baltimore prices, or any other prices. The selling of oil in Washington at their Baltimore prices by the two members referred to, appears to have been contrary to quotations they had on file with the bureau, and all they needed to have done to continue to sell oil in Washington at the prices they were quoting in Baltimore, was simply to have advised the bureau that they were doing so, and that would have ended it. The fact that they did not do so and saw fit to apply a freight charge from Baltimore to Washington on sales in the latter city was of their own volition, and was not brought about, and could not have been brought about, by any complaint to the bureau or any action by the latter looking to that result.

On page 161 of its brief the Government states that "as a result of rather lengthy and heated correspondence, the sale of five barrels made by a

member at Albany at $1.52 instead of $1.53 his filed price, was cancelled." The Government does not state in its brief what steps the bureau or council members took to bring about the cancellation of the sale referred to, but the record shows that the company advised its representative making the sale that it could not be done and received word that the order had been cancelled. There is nothing in the record to show that any subscriber or the bureau had anything to do with the cancelling of this order, and we assert that the entire transaction was a matter to be settled only by the seller and his representative, which the record shows was settled in this manner and not by any action by the bureau or its other subscribers.

On page 161 of its brief the Government states that an agent of a member was stopped from selling oil in storage at Syracuse to be shipped to Minetto, N. Y., at his Syracuse price, thus absorbing the freight. Quotations on file with the bureau are based solely on the price of linseed oil without the absorption of freight. From this it will appear that the sale of oil at a price with freight absorbed is at variance with the quotations of the seller on file with the bureau. Therefore, under the contract, a seller if he absorbs the freight on oil is obligated to report the transaction to the bureau, and that is all. The fact that he did not care to

absorb the freight but desired his agent to sell oil at a price which did not absorb the freight is not proof that some other subscriber or the bureau compelled the crusher to adopt such selling price. In this same section the Government states that "the council by resolution had limited the application of zone prices to points where warehouse stocks were carried," but it evidently prefers to leave this cryptic statement without further reference to the record, which clearly shows that the zoning plan afforded the trade every benefit from warehouse stocks carried by different crushers.

On page 161 of its brief, the Government states that sharp criticism was directed against one member by two others because one of his agents had made two mistakes in making sales at five cents under the company's filed price for zone 3, and likely no other mistakes were made by that agent. There is nothing on page 467 of the record as referred to by the Government that shows that any criticism was directed against any one.

On page 162 of its brief the Government states that a member wrote the Bureau that it was holding a sale open until it heard what the price of another member was, and that the member was subjected to a severe reprimand by the bureau for doing so. We deny that any severe reprimand was sent by the bureau to the council member referred

to in this transaction. We would respectfully request this court to read the correspondence in reference to this entire matter appearing on pages 475 and 476 of the record. In the letter from the bureau it is seen that what the bureau was actually seeking was absolutely contrary to what the Government continually alleges the bureau and defendants were seeking. That is to say the bureau in this letter was impressing upon the members that the exchange of market information through the bureau was for the purpose, and only for the purpose, of enabling the Bureau's clients individually to place their own valuation on their merchandise, and their merchandising ability, and that if on the other hand, any subscriber to the service of the bureau should attempt to use the market information as an actual means, if not an actual incentive, to do as the other fellow was doing, then the bureau had failed in its purpose to instill this all important principle in that subscriber's mind.

On page 162 of its brief the Government states that all the members by correspondence expressed a determination not to deliver in one month sales made for a subsequent month. Assuming that such was a fact, which we deny, is it unlawful for competitors to express such a determination if such determination is not the result of an agreement, express or implied. That the determination alleged in the Government's brief was not brought

about "by correspondence" is shown by the record (R. 484), wherein it is shown that each crusher, with the exception of one, stated that he never had indulged in such a practice, and such expression was not the result of any correspondence passing through the Bureau or discussions at meetings, but was an expression of what had been the practice of these crushers before they ever came into the Council.

That there was no understanding between the Bureau and its members that deliveries of oil sold in one month or any time the buyer and seller agreed on is shown from the following: John A. Mann of the Mann Brothers Company, wrote:

> "We do not sell oil for delivery during any months at a variation from our filed prices. If on occasions we have made such sales we have promptly filed a new price covering the sale." (R. 484.)

That the practice of selling oil for delivery in one month at a price quoted for another month was considered bad merchandising and unfair to other customers is shown from the record at page 484, which reads as follows:

> "Midland Linseed Products Co. 9-16-19.
>
> "We do not sell and deliver oil in August at our September price, and we do not intend to sell and deliver oil in September at our October

price, nor deliver in October a portion of November-April contracts.

"We do not consider that this practice is materially different from cutting our regular established price, which would not be fair to our other customers, and which we would consider very bad merchandising." (R. 484.)

Thereafter in the Government's brief it is stated that a sale made by an agent at $1.60 was by the member changed to $1.61 as a result of a complaint; that by criticism from one member, the agent of another was stopped from selling small lots; that the filed price of a member was $1.70 for March in zone one, if taken in equal quantities with deliveries for April and May with prices at those months, and that a sale not made in accordance therewith was criticised by another member because not in accord with the filed price of the offending member, and that the agent was written that he had exceeded his authority, and such sales were of course stopped.

We deny that by reason of any agreement, express or implied, or any complaint or criticism passed through the Bureau any one was compelled to change a price on a sale already made, and we assert that if such a thing was done it was entirely personal with the seller and buyer connected with such transaction. No member was stopped from selling small lots at a price filed for carload lots by

reason of any criticism from a member passing through the Bureau. The transaction referred to by the Government is covered at page 510 of the record, and instead of its being considered as a criticism, the company making the sales wrote expressing its thanks for having its attention called to the matter of the error, but nowhere does the record show that any sales were prevented or any attempts made to prevent sales being made for any reason whatsoever. The sale at $1.70 referred to above was admitted by the crusher making the sale as being irregular, and without any solicitation on the part of the Bureau or other subscribers the Company wrote that they were advising their agent that the sale was made without their authority and stated they had given further instructions. Nothing appears in the record, however, that such sales were stopped, and if it be true that they were stopped, there is no proof that the Bureau or its members by concert of action or otherwise stopped such sales.

Thereafter in the Government's brief follow statements, not based on the record, we assert, that other practices, some of which involved prices, were criticised and corrected.

On page 163 of its brief the Government states that by correspondence an understanding among the members was secured that all would charge one cent per gallon per month or fraction thereof for

carrying oil after purchase. This is not the fact as appears from the record. What was actually done was that an investigation was made into the cost of carrying oil beyond the contract period for the delivery thereof, and it was recommended that as it cost money to store oil and one cent per gallon or fraction thereof was a fair carrying charge, it was so recommended. However, it appears from the record that Archer-Daniels did not follow this recommendation.

The Government on page 163 alleges that a Kansas City Agent of a member was stopped from guaranteeing against decline. We state that the allegation that one was stopped from guaranteeing against decline or stopped from conducting his individual business as he saw fit is entirely disproved by the record. As stated elsewhere in this brief, discussion was had at a meeting with respect to guarantee against decline and it was the consensus of opinion, and so expressed, that such a practice was an unfair method of competition and ought not to be indulged in by the crushers. In view of the fact that the Federal Trade Commission, a Governmental agency, has issued complaints charging the practice of guaranteeing against decline as an unfair method of competition in violation of Section 5 of the Federal Trade Commission Act, can it be said that a resolution passed by a number of competitors condemning such a prac-

tice and urging their members not to indulge therein can be considered as part of a plan to bring about an unlawful combination and conspiracy in restraint of trade?

Next, on the same page the Government states that because of an inquiry with reference to a certain sale by a member, thereafter when a sale was for export, the members so reported, which appears from the correspondence to have been previously agreed upon by the members.

If it were not for the seriousness of the case at bar, such a statement appearing in the Government's brief as showing part of a plan to unlawfully restrain trade or commerce, would be, to say the least, ludicrous. If all the linseed crushers in the world were to agree to report whether or not their sales were for export or import, how could that bring about any restraint of trade?

On page 164 of its brief, the Government states that expressions were obtained from all but one condemning an arrangement of selling oil on consignment whereby in consideration of storage, the purchaser could at his option take it out of his warehouse at carload price, having the oil invoiced on the date of its removal from the stock, which arrangement would enable him to take the entire lot when delivered to his warehouse, if he felt that prices were going to advance, or he could take it at carload price as used. We are glad to note in

this one instance the Government characterizes this as obtaining an expression condemning an arrangement, instead of asserting or insinuating that an agreement to prevent such a practice was brought about. However, we contend that the Council members were well within their legal rights in expressing condemnation of such an unfair arrangement. We assume that we have not reached a time in the history of this country when competitors cannot come together and give voice to their expressions condemning what is believed to be, and as a matter of fact, is, an unfair method of doing business.

On page 164 of its brief, the Government states that one member had taken a sale from another member by waiving the customer's giving a trade acceptance. In another part of the Government's brief they allege that as part of a combination or conspiracy to restrain trade and commerce, the defendants agreed on uniform terms of sale and that such terms embraced trade acceptances. We assert that if any further proof is needed to satisfy this Court that trade acceptances were not uniformly adopted and used by the members of the Bureau, it is the statement appearing in Government's brief at page 164, that one member had taken a sale from another member by waiving the customer's giving a trade acceptance.

On page 165 of its brief, the Government states that a member was accused of having allowed five cents off when purchasers furnished their own barrels, and upon inquiry, the agent of the member declared that he was not doing so. The Government states that "this shows that no such practice was allowed by any of them." On page 164 of the Government's brief it refers to identically the same kind of practice, but in that instance it states that the member who allowed a customer five cents for the use of the customer's containers, was criticised and stopped the practice. No comment on the inconsistency of such statements seems necessary. However, the record does not show that any one was criticised for such a practice.

BONDS

No denial is made that the service contract required each member to deposit with the Bureau Liberty Bonds of not less than $1,000 or more than $10,000, but we unqualifiedly deny that the deposit of such bonds was for the purpose, or had the effect of preventing any member from conducting his business as he wished. An examination of that part of the service contract dealing with the deposit of Liberty Bonds clearly shows that the requirement was solely for the purpose of insuring that clients of the Bureau would strictly adhere to the terms of the contract or any reasonable requirement of the Bureau.

Now, if we take the contract by itself and analyze it carefully, we find that it requires true, accurate and immediate reports on market information to be filed with the Bureau; that all information so reported or filed with the Bureau shall at all times be purely statistical and pertain only to past transactions and that no part of the machinery of the Bureau will be permitted to be used to fix prices, divide the territory or limit the sale, production or manufacture of linseed oil or any other product.

The very existence of the Bureau depended upon this latter provision and is it any wonder that Armstrong, realizing this, required of his clients a bond guaranteeing strict adherence to the letter and spirit of the contract?

The integrity of the Bureau depends upon the truth and accuracy of all market information distributed by it. There is nothing in the requirements of the contract that provide for an unlawful action by its members but it was possible that some client might attempt to use the machinery of the Bureau in an unlawful manner. Hence the bond requirement.

The Government says that the bond could be forfeited for failure on the part of a member to comply with any reasonable requirement of the Bureau. Is there anything in the record indicating that the Bureau ever made an unreasonable re-

quest or demand of any member, and if the Bureau should do so, would it dare attempt to forfeit the bond of a member for non-compliance with an unreasonable demand?

The only demands that Armstrong could reasonably make of a member under the service contract would be for true, accurate and prompt market information as to past transactions. Nothing else could have satisfied the provisions of the service contract.

While at times, as appears from some of the market letters offered in evidence, a subscriber did not advise the Bureau of past transactions as provided for in the service contract, the failure to do so was of a trivial nature and did not appear to Armstrong to be an intentional evasion of the reporting provisions and certainly not an attempt to use the machinery of the Bureau to fix prices, divide territory or curtail production. How careful the Bureau was to see to it that at all times its subscribers adhered not only to the letter and spirit of the service contract but that their operations did not in any way violate the Sherman Anti-trust Law is indicated by the careful check and supervision to that end exercised over all its subscribers as shown by the record.

It is thus seen from the "brief recapitulation" that the Government is attempting to have this Court set aside decision of the trial Court below

by the narration and characterization of a few isolated and unimportant transactions, many of which if supported by the record, which we do not admit, would not be any proof that there was ever an agreement, express or implied, entered into or contemplated by the Bureau and the linseed oil crushers, by which it was hoped that the prices to be obtained for linseed oil would be in any way affected other than by the law of supply and demand, and based on true, accurate market information, which businessmen were entitled to receive and use in formulating their best individual judgment.

Satisfactory proof that the defendants combined and conspired to unlawfully restrain trade and commerce is not submitted to this Court by any showing in the Government's brief, or by *simply stating* that daily and weekly sales or special sales to favored buyers were bulletined through the Bureau, or that fluctuations in prices after the organization of the Council were quickly and materially reduced, or that prices of all the members soon became practically uniform, or that views were exchanged as to how to apply the zone system, or that a member was criticised for this or that, or that sales under certain conditions were stopped by reason of a member sending complaints through the Bureau that such and such a sale had been made contrary to the filed price; or that sharp criticism was directed against one member by

other members because his agent had made two mistakes in making sales at five cents under that company's filed price for a certain zone, and so on.

It is not surprising that a crusher would write the Bureau asking whether or not a trade practice was being indulged in by another member which the inquiring subscriber considered to be contrary to what was thought to be fair business practice.

Is a combination or conspiracy to be presumed because inquiries are bulletined through the Bureau as to whether or not special prices to favored buyers are being quoted, or that a few customers are getting rebates on containers which in effect amounts to a cut price, in view of the record which clearly sets forth that if such practices are to be indulged in by the subscribers, all that is required of them is to report such practice to the Bureau?

The service of the Armstrong Bureau is for the gathering, compiling and dissemination of true, accurate market information as to past transactions without any predictions or comments as to the future conduct of its clients with respect to prices and production.

All that the Bureau requires of its members is that when it furnishes market information for dissemination that information shall be true and pertain to past transactions. If inquiry comes to the Bureau from any of its clients which raises a

presumption that the information disseminated by the Bureau to its members is contrary to the actual facts existing in the trade, there is nothing else for it to do to protect the integrity and efficiency of its institution but to seek and disseminate information showing the true situation. Nothing more was ever done in the case at bar, and no other course of conduct will ever be pursued by Armstrong and the Bureau. Clients of the Bureau not having in mind at all times the welfare and future of the Bureau's activities and services to related industries, might indulge in practices contrary to what they had advised the Bureau and which had been disseminated through the Bureau. Individuals are only human and it cannot be expected that those who are not closely identified with the work of the Bureau day in and day out, would have the jealous consideration of the high ideals for business up-building as have Armstrong and his assistants.

Therefore it is not surprising that there appears here and there in this record isolated transactions, which when described by one who is obsessed with the idea that all institutions of this kind are conceived in iniquity should be able to create in the minds of some a suspicion that perhaps there is something wrong in the operation of the plan.

But the Judge in the lower Court had every defendant or its representative before him for exam-

ination. He also had before him for examination a few Government hand-picked buyers, and also buyers called by the defense. He had also placed before him for his consideration tables showing every quotation and sale filed with and transmitted through the Bureau, the accuracy of which was certified to by the Government's own representative.

Counsel for the Government in the lower Court called to the Judge's attention these small isolated transactions and sought to befog the real issues but without success.

To the Government's credit it may be said that at no time in the proceedings through the lower Court nor in its brief in this Court does it make the statement that market information disseminated by the Armstrong Bureau was not accurate and true in every respect. At no stage of the proceedings from the lower Court to this high tribunal is there any allegation made that the market information disseminated by the Bureau, if treated by the individual crushers without concert of action or agreements, express or implied, to artificially affect prices, was not such information as a prudent business man was seeking and will continue to seek even though this Honorable Court should close the avenues for obtaining such information, economically, accurately and completely through the Armstrong Bureau.

Therefore, there can only be one point in the Government's attack against the service of the Armstrong Bureau and that is that irrespective of whether or not the information is true and accurate and is such information as a sagacious business man should have and will seek for the proper conduct of his business, the collection and dissemination of such information by the Bureau to a number of competitors at the same time inevitably results in an undue restraint of trade and commerce and indirectly brings about a combination and conspiracy in restraint of trade. This means, if the Government's contention is sound, that Judge Carpenter's opinion should be reversed on the ground that he has done violence to the evidence, and that this Court will say to these defendant crushers you must stop obtaining accurate market information openly from each other, which means they must obtain it by other means, fair or unfair, or conduct their business in ignorance of essential business facts.

COMPETITION

The Government in its brief, pages 167-170, would have this Court believe that the Armstrong Bureau had formulated and put into operation with its clients a form of competition entirely dissimilar from that contemplated by the Sherman Anti-Trust Act. The Government's conception of

business as conducted at the time the Sherman Law was enacted is described by the two following excerpts from the Government's brief:

> "Under these conditions but little attention was given to the prices of competitors." * * *
>
> "All effort, therefore, was concentrated upon producing the goods as cheaply as possible, so that they could sell them upon the market against competition, and yet realize a reasonable profit; and no dependence was had upon the prices of competitors."

We believe that it is a fact, and this court will take judicial note of it, that in practically every line of business at the time the Sherman Law was enacted up to the present time selling prices were and are based primarily upon the prices being charged by competitors; that is, upon the market, and that very close and unremitting attention was invariably given to the prices of competitors.

The statement that it was a general business practice, at any time, to determine selling prices by the cost of production alone is without foundation. Anyone who has anything to sell desires to get the highest price he can for it. As a rule, however, all he can get is approximately what his competitors are charging for the same product.

A manufacturer now, as he did in the past, studies the price of his competitors and must of necessity fix his price therefrom. The Bureau has

never attempted to use what might be termed "new competition" with any of its clients. All it does is to gather and disseminate to its clients true, accurate and immediate market information. A manufacturer operating under the plan of the Bureau is thus enabled to devote less time than formerly to studying his competitors' prices because it requires less effort on his part to ascertain what those prices are. Further, he does not have to spend considerable time in sifting the truth from the falsehoods which formerly came to him about his customers' prices. Further, by reason of the Bureau's service he has more time left to devote to study of his cost sheet and more incentive to do so because he realizes more clearly than before that his prospects of making profits depend to a large extent upon efficiency of production, management and service than upon shrewdness in selling.

The Government in its brief is attempting to show that it is a recognized principle of economics that under fair competition prices by different competitors in the same market differ widely among themselves. The contrary is true. The accepted teaching of economics is that under fair competition prices at any given time tend to be uniform or approximately uniform, except as they are influenced by factors which actually change the value of the commodity offered or the services

rendered in connection therewith. The freer the competition the greater the uniformity and the more closely will the price conform to the theoretical minimum, which is the lowest price that will suffice to bring out supply sufficient to meet the demand.

Uniformity of price at a given place and time, may, of course, be produced by an agreement among sellers, or, under different circumstances by an agreement among buyers, but it may also be brought about by fair, open competition accompanied by a system of prompt transmission of intelligence. The latter condition is best exemplified by the stock market. Any seller's price for any stock for immediate delivery, if he wants to sell at all, is "the market." Absolute uniformity of price prevails, and this in the most freely competitive market that exists.

William Stanley Jevons in his work "The Theory of Political Economy," page 90, says:

> "There can be no reason why a person should treat exactly similar things differently, and the slightest excess in what is demanded for one over the other will cause him to take the latter instead of the former. * * Hence follows what is undoubtedly true, with proper explanations, that in the same open market at any one moment, there cannot be two prices for the same kind of article. Such differences

> as may *practically occur* arise from extraneous circumstances, such as the defective credit of the purchasers, *their imperfect knowledge of the market*, and so on." (Italics ours.)

Let us assume three crushers are selling linseed oil in the same town. One is quoting a price of $1.50 per gallon and the other two are quoting a price of $1.70 per gallon. Each we will say, is well stocked with linseed oil. Ten buyers are in the market for a quantity of oil which any one of the three crushers could supply. Is there any competition between the crusher with the $1.50 price and the two crushers with the price of $1.70? None at all. Until the two crushers with the $1.70 price learn of the lower price and make their prices more nearly uniform with the other crusher's $1.50 price, they are out of the market until all of the oil of the $1.50 crusher is gone. That certainly is not the kind of competition old or new, which the Sherman Act aims to foster. It does, however, conform very nearly to the idea of Counsel for the Government as to just what competition meant when the Sherman law was enacted and what it means today. We cannot, however, agree with his formula.

The Government contends that the plan of the Armstrong Bureau, as it was operating among the defendant manufacturers, "profoundly affects the economic laws governing prices which

previously existed." The defendants disclaim not only the intent, but even the ability to alter economic law. The laws continue to function. Competition is not stifled, it is vivified.

THE HARDWOOD LUMBER CASE

The Government states in its brief (page 170) that it is necessary to cite but one authority, American Column & Lumber Company vs. United States, decided by this court on December 19, 1921, in support of its contention that "the combination between the defendants is unlawful, because when carried into effect it inevitably restrains interstate commerce."

In attempting to point out the similarity between the facts in the Hardwood Lumber case and this case the Government again takes pains either to state facts incorrectly or to omit certain facts found in the lumber case, which if presented by the Government here, would show entire dissimilarity between the two cases.

The Government states that the plan for the exchange of information with reference to production and sales was of the same nature as the plan presented in the lumber case, though differing somewhat in detail. It then proceeds to make a comparison of what it says are not only the facts in the Lumber case but the facts in this case. The Government says that in the Lumber case daily

reports were made to the Secretary of the Association by each member, giving particulars as to the sales and shipments, and the information thus received was compiled by the Secretary and sent out to all the members.

As a comparison in this case it states that all quotations at a reduced price are wired within a few minutes to the Bureau and by the Bureau immediately relayed by wire to the other members.

The Government does not state, however, that in the latter practice the Bureau in relaying to its members "quotations at a reduced price" did *not* suggest that prices should not be reduced or increased, as was found to be the fact in the Lumber case.

The Government states that in the Lumber case monthly reports by the members to the Secretary were required which were compiled and distributed among the membership monthly. It does not state, however, that the Court found that these monthly statements were accompanied by the Manager's opinion, that production was greatly below normal or falling off and therefore prices ought to go higher.

In the Lumber case the Government states the Association held monthly meetings, as was done by the Council in this case. The Government admits, however, that for the convenience of the

members of the Lumber association, meetings were held in different sections of the territory covered by the association—sometimes two or three meetings a month, and some members probably attended more than one of them. The evidence in this case shows that only one meeting a month was held.

The Government states that the evidence in this case indicates a much more thorough inquiry by the members into each other's business at the meetings of the Council than was shown to have occurred in the meetings of the Lumber Association. The Government neglects, however, to set forth in its brief in this case any references to the record which support this statement. And further, the Government in its brief conveniently neglected to state that in the Lumber case, as the Court found, members wrote letters and openly stated that they never attended a meeting of the Lumber Association that they did not thereafter increase the price of their lumber. We do not think that the Counsel for the Government would overlook such a fact in this case if any such course of action by Linseed Council members had taken place subsequent to a meeting.

Counsel for the Government states that the conduct of the Manager in the Lumber case could not possibly have been so effective as the communica-

tions from the Bureau to its subscribers as shown by the evidence in this case. We do not know, so therefore do not care to state, how effective the conduct of the Manager of the Lumber Association was, particularly in the matter of prices. We do know, however, that the Court in that case found as a fact increases in the price of the varieties of Oak ranged from 33.3% to 296% during the year; of Gum, 60% to 343%, and Ash, from 55% to 181%.

The Government in its brief states that the Manager of Statistics in the Lumber case only advanced arguments to his members based upon facts or assumed facts. In this case the Government says the Bureau gave peremptory orders and in all cases spoke as one having authority. In answer to this, we simply state that the record and particularly the portions of the record quoted in our brief, shows on its face that the Bureau never at any time gave a peremptory order or spoke as one having authority over the conduct or management of any individual crusher's business. We say without hesitation if there was one iota of evidence in the entire record to show that the Bureau even attempted to give a peremptory order it would appear in the Government's brief in large type.

The Government in its brief, page 172, makes the following startling statement:

> "Certainly in the Lumber case the minute details of the business of the members were not laid bare to the extent that such details are shown to have been exposed among the members of the Council in this case."

In the Lumber case the Court found that not only the minutest details of the Members' business were distributed to each other, but that a discretionary inspection was made of each member's stock and a compiled report thereof distributed. We deny that the members of the Linseed Oil Council submitted their books or stocks to the discretionary audit of the Bureau or their competitors. We also deny that the minute details of the business of the members of the Bureau were laid bare to either the Bureau or competitors. The only information received and bulletined by the Bureau was daily and weekly reports of sales, reports of changes in price quotations after the same had been quoted to the trade, and monthly reports of stock on hand. Now and then an inquiry would come to the Bureau asking for information with respect to a reported sale or quotation, which did not check for accuracy with the Bureau's market information and the Bureau bulletined members with respect thereto.

It should be called to the attention of the court that in bulletining these inquiries to members of the Council, any special price which the inquiring

subscriber reported he had bid for such prospective order *was not* incorporated in the inquiry sent out by the Bureau. The Bureau nor Council members never inquired of the crushers as to whether or not they were making enough money from the sale of their products, whether they were crushing more flaxseed than was good for the industry; whether the fact that the flaxseed was burning up in the Northwest in 1919, should not bring about higher prices for linseed oil or whether any Council member was going to take the lead or follow the lead of others.

The Government states in its brief (page 172) that in the Lumber case it was unnecessary for any inference to be drawn that there was an agreement to curtail production, or as to prices, because

> "The plan, within itself, was unlawful, in that when put into effect the inevitable result was the curtailment of production and the advancement of prices. This contention of the Government was upheld by the Court."

Whether or not the Government ever presented the Hardwood Lumber case to the court based solely on such a contention is unknown to us, but if it contends in this case that the inevitable result of the service of the Armstrong Bureau was the curtailment of production and the advancement of prices, we assert that the record in this case absolutely does not support such contention.

If the above contention of the Government was upheld by the Court, why does the Government present this case in the lower court, and now to this Court, with so much stress upon distorted references to trivial, infrequent and remote transactions.

In the Lumber case this Court found that while there was lacking a definite agreement as to production and prices, this was supplied by facts submitted to the Court below. We assert that the record in this case disproves any agreement, direct or implied, with respect to prices; that the Government itself in this case admits that there was no agreement to curtail or affect production.

In the Lumber case such statements as the following appear:

> "There is no agreement to follow the price of others, although members do follow their most intelligent competitors if they know what these competitors have been actually doing."
>
> * * * * * *
>
> "With co-operation of this kind we will soon have enlisted in our efforts practically every producing interest, and you know what that means."
>
> * * * * * *
>
> "If there is no increase in production, particularly in Oak there is going to be good business."
>
> * * * * * *

"No man is safe in increasing production. If he does, he will be in bad shape as the demand won't come."

* * * * * *

"Reference was made to members who contemplated running day and night, and it was stated that the lumber industry had seen these unusual market conditions before, and that we ought to be very sure that the market is capable of taking care of night and day lumber."

* * * * * *

"The lumber men have gone through several lean years, but we are confronted with the possibility of killing the goose that laid the golden egg. Overproduction will spell disaster, as it should always be borne in mind that the maximum production capacity of the saw mills of the country is much in excess of any demand the country has ever known."

* * * * * *

"The danger we see lurking in the future for the lumber industry is over-production. * * * If ever there was a time when rich rewards awaited the producer of hardwood lumber, now is that time. There are glorious opportunities ahead."

* * * * * *

"Supply and demand must necessarily govern prices. The demand is with us, the supply inadequate, therefore, values must increase, as competition in hardwood is only among ourselves."

* * * * * *

> "The tendency of the market is upward and will undoubtedly continue to advance so long as sales and production bear their present relation to each other."

There is not a single statement or market letter in this case that in any way borders on the above, and the Government checked the Bureau's records for accuracy and completeness. When flaxseed was burning up in the Northwest in 1919, the crushers sent to Argentine for flaxseed and at great expense brought it to this country and supplied the trade as economically as the quantity of seed procured would permit. At this time the price of flaxseed rose to $6.40 per bushel, a price never heard of in the industry. Instead of encouraging, or attempting to encourage his clients to raise prices of linseed oil, Armstrong by letter requested each and every one as a patriotic duty to keep the price of linseed oil down and if necessary to take a loss. In the face of such testimony, how can Counsel for the Government assert that the operation of the Bureau with its clients was similar to that found in the Hardwood Lumber case?

In the case at bar, daily and weekly reports were filed with the Bureau and sent to its clients but never with a suggestion of any kind that prices ought to be changed, up or down, or that production ought to be curtailed. We have herein repeated this statement several times, but we deem

it necessary in view of the persistent statements appearing in the Government's brief that clients of the Bureau were subjected to more minute investigation and more detailed instructions were given them by the Bureau than was the case in the Hardwood Lumber Association.

In the Lumber case it was shown that prior to each meeting a questionnaire was sent out to the members and from the replies received, the statistician compiled an estimate of the conditions of the market, *actual and prospective*, which was distributed to the members. There were eleven questions on the list of which the most important were:

> "4th. What was your total production of hardwood during the last month? What do you estimate your production will probably be for the next two months?
>
> "10th. Do you expect to shut down within the next few months on account of shortage of logs or for any other reason? If so, please state how long you will be idle?
>
> 11th. What is your view of market conditions for the next few months and what is the general outlook for business? State the reasons for your conclusion."

The record shows that nothing like this ever took place through the Bureau at its meetings, or ever was in any way attempted. We repeat there was never a discussion at the meetings or a market

letter bulletined through the Bureau with respect to what the market would be in the future, or what would be the condition of production in the future, or what prices ought to be or might be in the future. Further, it is a matter of record in this case that there never was a discussion of prices at the meetings or in market letters bulletined by the Bureau.

It was also shown in the lumber case that each member should file at the beginning of each month, price lists showing prices f. o. b. shipping point, which was to be stated. Nothing of this kind ever took place through the Bureau or through the Council. The record shows that when a member filed his quotations with the Bureau he was not required to file any other list until after he made a new quotation to his trade. Nowhere in the record does it appear, as in the Lumber case, that members wrote any letters with respect to the benefits derived from the service, nor are there any letters or communications in the entire case showing any gratification over the fact that roads were impassable, shipping congested, or production curtailed.

Below are quoted some replies to a letter from the manager of statistics asking for comments on the plan in the Lumber case:

"There seems to be a friendly rivalry among members to see who can get the best prices, whereas under the old plan it was cut-throat competition."

* * * * * *

"From the first report we received under this plan we were enabled to increase our price $6.00 per thousand on a special item of Oak."

* * * * * *

"Since we became members we have been selling our lumber at several dollars per M more than formerly and we are perfectly satisfied with the plan."

* * * * * *

"We have always left these meetings feeling that we did not get money enough for our lumber and that we ought to try to do better."

We would call the Court's attention to the fact that there was no "guide" or "manager of statistics" in the Linseed Oil Council, and no executives or employees of the Armstrong Bureau whose employment was in any way predicated on the service returns to the linseed crushers. We would also call the Court's attention to the fact that linseed oil, like lumber, is used to a large extent in building operations and elsewhere where lumber is used, and the record in this case shows that when prices of lumber were constantly advancing, the prices of linseed oil went up and came down and went up and came down just as did the flaxseed market.

We would also call to the attention of the Court the fact that the period involved in the Hardwood Lumber case is practically the same period in this case; that the record in this case does not show any predictions as to production and prices in the future, no preparation of reports with comments from the Bureau or its subscribers as to what the market ought to be, and that the record of the Bureau is a clear exemplification of what actually took place between the crushers and the Bureau with respect to the latter's service, without any thought in mind that the record of the Bureau should be cleaned up for the purpose of eliminating or destroying any expressions such as were condemned in the Hardwood Lumber case. We deem it important to make this statement for the reason that what the Bureau's records show in this case clearly sets forth the true situation without any attempt at color or subterfuge.

We therefore assert and feel that the Court will agree with us, that there is no similarity between the activities of defendants in this case and the defendants in the Lumber case; that the purposes sought and obtained in this case and the results thereof, are not at all comparable with those sought, obtained and condemned in the Hardwood Lumber case.

THE LAW

The charge of the Government in this case, as stated in its brief, is that the inevitable result of the exchange of true and accurate market information as to past transactions must inevitably result in a curtailment of production and the advancement of prices, and therefore is in violation of the Sherman Anti-Trust Act.

The Sherman Act being a penal statute, proof of its violation must be clear, positive and convincing.

> Northern Securities Co. vs. United States 193 U. S. 197.
> United States vs. Reading Co. 183 Federal 427.

As was said by Judge Carpenter in the lower Court:

> "The court should not construe the acts of the defendants to be illegal, when it can with equal facility, ascribe them to an innocent intention."

We contend therefore that it is incumbent upon the Government to show that the operations of the Bureau necessarily had the effect of curtailing production or enhancing prices. Further, if the Government relies on circumstantial evidence to prove a combination or conspiracy to restrain trade, as it asserts it does, it must show that the

circumstances upon which reliance is placed are inconsistent with supposition of innocence.

The burden is on the Government in this case to prove by a clear and satisfying preponderance of evidence that a combination or conspiracy existed among the defendants to bring about an unlawful result. The rule as to presumptions and burden of proof in a suit in equity for injunction to prohibit violations of the Sherman Act is substantially the same as in a criminal case for violation of the Act. That rule is very clearly announced in the case of Union Pacific Coal Co. vs. United States, 173 Fed., 737, 740, (CCA) Judges Sanborn and Van Deventer, Circuit Judges, and Munger, District Judge, as follows:

> "There was a legal presumption that each of the defendants was innocent until he was proved to be guilty beyond a reasonable doubt. The burden was upon the Government to make this proof, and evidence of facts that are as consistent with innocence as with guilt is insufficient to sustain a conviction. Unless there is substantial evidence of facts which exclude every other hypotheses but that of guilt, it is the duty of the trial court to instruct the jury to return a verdict for the accused; and where all the substantial evidence is as consistent with innocence as with guilt, it is the duty of the appellate court to reverse a judgment of conviction."

While this is a civil suit, it is based upon an alleged violation of the Sherman Act, which is a highly penal statute. Thus a judgment under the pleadings in such a civil action must necessarily rest upon the conclusion from the facts that this highly penal statute has been violated.

It is quite useless to review in this brief the decisions of the Courts which condemn combinations and conspiracies in restraint of trade in violation of the Sherman Anti-Trust Act. Each case stands upon its own facts. Each of the reported cases where acts are condemned as combinations and conspiracies in violation of law are well supported by courses of conduct from which any discerning mind can at once come to the conclusion that the conduct complained of constituted a direct restraint upon competition, and artificially interfered with the natural course of trade. We submit that no such degree of proof is present in this case.

We do not feel that it is necessary in this brief to discuss the legal difference between reasonable and unreasonable restraint of trade. We contend that there is no proof submitted in this case to show that *any restraint* was brought about through the dissemination by the Bureau of true, accurate market information as to past transactions. We feel, however, that what is the test of reasonable or unreasonable restraint of trade is not out of

place in this case, and we therefore quote below a portion of the opinion of the Circuit Court of Appeals for the Sixth Circuit. United States vs. Addyston Pipe & Steel Company, 85 Fed. 271-282.

> "In Horner v. Graves, 7 Bing. 735, Chief Justice Tindal, who seems to be regarded as the highest English judicial authority on this branch of the law (see Lord Macnaghten's judgment in Nordenfelt v. Maxim Nordenfelt Co. (1894), App. Cas. 535, 567), used the following language:
>
> "We do not see how a better test can be applied to the question whether this is or not a reasonable restraint of trade than by considering whether the restraint is such only as to afford a fair protection to the interests of the party in favor of whom it is given, and not so large as to interfere with the interests of the public. Whatever restraint is larger than the necessary protection of the party requires can be of no benefit to either. It can only be oppressive. It is, in the eye of the law, unreasonable. Whatever is injurious to the interests of the public is void on the ground of public policy."

There is no proof in the record that the interests of the public were injuriously affected by the operations of the Linseed Oil Council under the Bureau's service or that buyers of Linseed Oil ever complained that they were being penalized by prices quoted by the members of the Council. Further,

there is no proof in the record that crushers outside of the Council were injuriously affected in their efforts to compete for the business of the crusher defendants. Those who are injured are the first to complain, and the Government submitted no testimony that any one had complained against the operations of the Bureau.

It is a matter of record, however, that buyers called by the Government and the defendants testified that they never considered that the prices quoted by the defendant crushers while members of the Linseed Oil Council were out of line with price of flaxseed. This fact we assert ought to be proof sufficient that no one was burdened by reason of the exchange of accurate market information set forth in this case.

Below is quoted an excerpt from an opinion in the case of United States vs. United States Steel Corporation, 223 Fed. 154, 155:

> "We may begin the discussion by quoting the Government's concession in the original petition:
>
> " '*It is not here alleged that merely assembling and mutually exchanging information and declaration of purpose amount to an agreement or a combination in restraint of trade.*
>
> "*With this concession we are in full accord.* In these days every large business has its

societies and associations, and these meet periodically to exchange information of all kinds, to compare experiences, to take note of improvements in machinery or process, to discuss problems, and generally to profit by the interchange of ideas and the study of observed facts. When the business is manufacturing, of course, all this has a direct bearing on the subject of prices, and these conferences may therefore consider that subject specifically. It is probably unusual, however, to find such a meeting making a declaration of intention to charge such and such prices, although a mere declaration to that effect could hardly be regarded as unlawful. *Freedom of speech and freedom of individual action are justly prized in American society, and no legislation forbids men to come together and speak freely to each other about every detail of their common business.* And if each individual should choose to announce at such meeting the specific price he intends to charge for his wares, we are aware of no law that forbids him to do so." (Italics ours.)

It will be noted from the above that the Government conceded that merely assembling and mutually exchanging information and declaration of purpose did not amount to an agreement or a combination in restraint of trade. We call the Court's attention to the fact, however, that while there was an assembling and exchanging of in-

formation as to past transactions, there never was a declaration of purpose amounting to an agreement of any kind. The opinion of Judge Carpenter in this case with reference to the assembling and exchanging of market information is entirely in accord with the portion of the opinion in the steel case quoted above.

It is true that the crushers did have the benefit of accurate information which assisted each in individually forming his own judgment as to the prices he should charge for his product. Every one who has anything to sell always seeks to ascertain what others are selling the same products for. There can be no violation of law in that. Can it be said to be unlawful if persons having like products for sale agree among themselves to inform each other as to the prices that *have* prevailed? Nothing further was done by the linseed oil crushers. They had freedom to contract, to do a lawful thing, and they did nothing more. Not a scintilla of evidence has been presented in this case that indicates, by inference or otherwise, that the exchange of information by the Linseed Oil Crushers brought about an artificial influence on the linseed oil market.

The language of the Chief Justice in the opinion in U. S. vs. U. S. Steel Corporation, 251 U. S. 417, is apt on this point where he says:

"The opinion of an editor of a trade journal is adduced, and that of an author and teacher of economics, whose philosophical deductions had, perhaps, fortification from experience as Deputy Commissioner of Corporations and as an employee in the Bureau of Corporations. His deduction was that when prices are constant through a definite period, an artificial influence is indicated; if they vary during such period, it is consequence of competitive conditions. It has become an aphorism that there is danger of deception in generalities, and in a case of this importance we should have something surer for judgment than speculation, something more than a deduction equivocal of itself, even though the facts it rests on or asserts were not contradicted. If the phenomena of production and prices were as easily resolved as the witness implied, much discussion and much literature have been wasted and some of the problems that are now distracting the world would be given composing solution. Of course competition affects prices, but it is only one among other influences, and does not more than they register itself in definite and legible effect."

The Court cannot, and will not, decide this case on guess or presumptions not supported by evidence, but can, of course, only find the existence of a purpose to artificially influence prices, and the affecting thereof, by A CLEAR AND SATISFYING PREPONDERANCE OF THE EVIDENCE.

Applying the test of the Supreme Court in the language of the opinion in Board of Trade of Chicago vs. U. S., 246 U. S., 231, how can there be spelled out of the conduct of the linseed oil crushers any purpose or effect of lessening or suppressing competition?

The language of the Court applying such test is set out on page 238 of that opinion as follows:

> "Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as MERELY REGULATES and perhaps thereby PROMOTES COMPETITION, or whether it is such as may SUPPRESS or even DESTROY COMPETITION. To determine that question the Court must ordinarily consider facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation, or the reverse; but because knowledge of intent may help the Court to interpret facts and to predict consequences." (Emphasis ours.)

In State vs. Arkansas Lumber Co. (360 Missouri 212-169 S. W. 145-177) the Court held:

> "If in the instant case there had been touching this price current matter no antecedent unlawful acts of the Yellow Pine Association, if this association had not for years promulgated as current price lists which falsely represented and arbitrarily fixed the prices of yellow pine lumber pursuant to the adopted report of a committee on values, and if Smith, the secretary of the association, pursuing the lawful methods originated by him of obtaining records from correspondence of actual sales, had fairly compiled and averaged such reports into a list of current prices of yellow pine lumber, we would not say that Smith's acts or the acts of the association in his behalf were unlawful."

Was the information as to prices quoted such information as could lawfully be distributed and received by competitors? If answered in the affirmative, the next question, is, "Was this information used in an unlawful manner to artificially affect prices, and if so, how?" We assert that before the Court can find an unlawful use by the defendants of such information, it is necessary to find that there was an agreement, express or implied, to unlawfully use the information.

In U. S. v. Prowaty & Sons, 251 Fed. 375, 377, the Court, in quoting from U. S. v. Naval Stores Co., 172 Fed. 455, 460, said:

> "The gist of the offense is the unlawful agreement * * *. WITHOUT CORRUPT UNDERSTANDING THERE IS NO CONSPIRACY." (Emphasis ours.)

Again, the Court at p. 377, said:

> "In my opinion, unlawful agreement is the essence of the offense of combination or conspiracy under the Sherman Act. It is what separates what is permitted from what is forbidden. To hold it illegal for persons in the same business and same trade organization, after exchanging information and views, to act in the same way, but independently of each other, on buying, selling, or prices, would extend the scope of the act beyond anything heretofore decided and beyond its proper meaning, and would cause the greatest confusion and uncertainty."
>
> * * * * * *
>
> "The Government's contention that the indictment alleges an agreement to which the defendants were parties is based principally on the word 'concerted.' It is a word which unquestionably is often used in a sense implying agreement. But it is also used to describe similar action by different persons with the same object in view, not proceeding from agreement between them."

So far as we can ascertain no court, State or Federal, has ever held that the collection and dissemination of true, accurate market information, although obtained from and exchanged by competitors, constituted a violation of law as part of a combination or conspiracy in restraint of competition or trade. And we contend that Justice Clarke in his opinion in the Hardwood Lumber Case expressed the view that the interchange of true accurate market information as to past transactions did not constitute a violation of the Sherman Law when he said:

> "This elaborate plan for the interchange of reports does not simply supply to each member the amount of stock held, the sales made and the prices received, by every other member of the group, thereby furnishing the data for judging the market, on the basis of supply and demand and current prices." * * *

CONCLUSION

After the statements, claims and contentions of the Government are stated and summed up we submit that the showing which it attempts to make falls far short of proving that there was any such combination or conspiracy as alleged in the complaint.

The fundamental proposition in this case is that the defendants exchanged market information, but

there is no proof in the case, circumstantial or otherwise, that the exchange of such information artificially affected the market of linseed oil. Absolutely nothing is presented to show that market conditions would not have been exactly the same as they were if there had been no Bureau or exchange of market information and the crushers had received information through their own individual efforts. It is undisputed that the linseed oil market followed the flaxseed market, and that the flaxseed market is a constantly active market, uncontrolled by the defendants. It is also the undisputed fact that the prices of linseed oil were never out of proportion to the price of flaxseed except for a short period when the crushers were selling oil below the cost of replacement. No evidence is presented that the price of linseed oil was unreasonably high or that the crushers made large profits.

No evidence is presented that the buyers of linseed oil, at wholesale or retail, were in any way burdened by the activities of the defendants. The market went up and down, had its periods of inactivity, and the competitive bidding for business of buyers remained substantially the same as it did during the thirty-two years previous as shown by the Table of Prices during these thirty-two years. (Defendant's Exhibit 2.) The formation and the activities of the Bureau did not prevent the price

of linseed oil falling about forty cents per gallon during the first four months of its operation, nor did it bring about the rises and falls in the later months.

The most that can be said relative to the exchange of statistical market data is that it gave each crusher better, more complete and dependable information as to the condition of the market. This each was trying to get by his own effort and at his own expense. There can be no objection, legal or otherwise, to the Bureau's procuring such information for clients at a remuneration to the Bureau. They were previously procuring it as best they could through their own sales forces.

In order to be of service, earn its compensation, and remain in business, the Bureau must be jealous and safeguard its own business integrity. It must insist that the information which it receives and relays be absolutely accurate and dependable and that it is as complete as required by the contract. Otherwise, the Bureau could not function or continue in business. If the Bureau had sent out inaccurate information, its service as a clearing house for market information would have been discredited. Each crusher used the information he received from the Bureau in the same manner as formerly when he received it from his own agencies, that is, to form his own judgment as to the state of the market, and as to when, where, and

at what price he should sell his own product. Nothing can be deduced or inferred from any testimony of the defendants that they entered the service with the intent to artificially affect prices, nor can any such deductions or inferences be drawn from the activities of the defendants or the result of such activities.

These crushers did nothing more than any other prudent business man endeavors to do when he explores every avenue of his industry to ascertain the facts relative thereto. Because he gets better and more accurate information by agreeing *with a Bureau*, to exchange such information as he may have for like information from his competitors, does not make such arrangement illegal. There must be a purpose, intent and effect of artificially affecting the market. We therefore submit that this Court should endorse and adopt the findings of fact and argument of Judge Carpenter in his opinion. It bears evidence of having been carefully, fully and conclusively thought out after weighing all the evidence and the economic and legal principles involved. His conduct and participation at the trial indicated that he had a clear insight into manufacturing and merchandising problems, business ethics, and a practical knowledge of how they should be applied. He knows, as every one ought to know relative to present day business, that

"In order to obtain efficiency in business, as well as other human activities, it is necessary to have reliable, immediate and adequate records. With the progress that has been made in the last century it is not to be expected that business alone has stood still."

* * * * * *

"It is because business is so much more complex, the volume so much greater, the margin of profit on single transactions so much less, that the merchants of today must have at instant command reliable and adequate information, immediately to be secured and more or less permanent in form. *Business is no longer a game of chance, but a matter of scientific calculation.*" (Italics ours.)

The Government lends its powerful arm and efforts to the general purpose of procuring statistical information relative to certain industries for the purpose of disseminating it to the particular advantage of all persons engaged in those industries, and the general advantage of all. The Department of Agriculture gathers and disseminates many varieties of statistics relative to the grain and livestock industries, and particularly statistics in reference to markets. Enormous appropriations of money have been made for this purpose.

A proposal is now being seriously made through the press that each day at noon the Department of Agriculture send out by radio the prices in the

grain and cattle market, so that the farmer may pick it up while he eats his dinner. The Bureau of Mines of the Department of the Interior gathers information as to production, importation, exportation, sales, and prices of oils and other mineral products, and distributes the same with great expedition so the same may be of news value to the people interested in the industries.

The Federal Trade Commission gathers such information and sends out reports thereof to the newspaper and pulp industry. It also performs the same for other industries.

The Department of Commerce is engaged in an extensive program of gathering trade statistics in a number of basic industries and reporting the same to all engaged therein.

The Department of Labor gathers information relative to every branch of labor, wages, cost of living and sends it out in compiled form.

There is no department of the Government that has any machinery at all for the collection of trade statistics that does not do so and put it into the channels of industry.

Why then should the Government say that men undertaking to do precisely the same thing, are violating the law? The use of statistics which the Government furnishes aids men to better exercise their own judgment in conducting their business. The Government statistics may even help manufac-

turers to eliminate the wide spread that might exist in the market if they did not have the knowledge which these statistics give them. They are intended to help the recipients thereof to conduct their business more efficiently and advantageously.

There are innumerable private agencies, such as stock exchanges, boards of trade, associations, institutes, trade journals, and newspapers which gather market information, including prices, and give to those interested in same.

It cannot be said that the Armstrong Bureau was not giving its statistical data to the buyers and the public, because all quotations made by its subscribers had to be given the trade before sending it to the Bureau. It is also of record that the Bureau gained a surprising amount of publicity by inviting buyers to inspect the system and the statistics, advertising the Bureau's operations, speaking to organizations of buyers, and laying bare its whole plan of operation to all who were interested therein, including representatives of the Department of Justice and the Federal Trade Commission.

The Bureau did everything it possibly could do to render honest, efficient and lawful service to its clients and the public. Its clients had as lawful right to take the information received from it as they would information received from any Department of the Government, or through their own en-

ergy and initiative and to use it in forming their own independent business judgment.

If thereby a subscriber forsees the high peaks in advancing sales and avoids the low depressions in falling markets, or determines when to sell or when not to sell, or when to increase production and when not, that is an advantage which is his lawful right. Therefore, we assert with confidence that the record in this case discloses nothing of any plan or scheme or device to artificially affect the linseed oil cake or meal market, and there was nothing in the motives, purposes or actions of the defendant crushers than to obtain and use this information freely and without restriction.

The Government has tried to build up a case similar to that of the American Column & Lumber Company vs. United States. In so doing it has attempted to color this case and to cast discredit on the purposes of the defendants in their operations with the Bureau by combing the entire evidence with most exacting diligence. It has used what appear to us to be misrepresentations of fact, misquotations of evidence, partial quotations of documents and statements of witnesses, when full and fair quotations would make them innocuous or beneficial evidence for the defendants; it has indulged in unwarranted inferences and unfair deductions, groundless suspicions and cynical implications to asperse the motives and the conduct of

the defendants. We believe we have with equal diligence but greater care and accuracy of statements met and disproved its accusations of combination and conspiracy fairly, fully and convincingly, and thereby swept away the diversion from the real point of issue herein, which is whether competitors in business can agree to exchange through a private institution price data, and each use the same in forming his own judgment as to the manner of conducting his own business.

The matter of uniformity of price of itself means nothing so far as proof of combinations or conspiracies is concerned if there is no proof of effort to bring it about by concerted action.

Weighing the evidence in this case by every measure, we assert there is absolutely no proof that prices were affected by any concert of action on the part of the defendants. The operations of the Bureau and its clients did not bring about practices which have heretofore been regarded as opposed to good morals. Neither were they characterized by deception, bad faith, or oppression nor were they against public policy because of any tendency to hinder competition or create a monopoly. Competition was at all times keen, free and fair as commonly used and practiced by honorable opponents in trade.

We therefore submit, that the Trial Judge who heard the evidence first hand as it was presented from the mouths of witnesses and from documents as they were read and introduced into the record, did not do violence to the evidence in his opinion but that such opinion is fully sustained by the record and on the basis of law, justice and common sense, and should be affirmed.

Respectfully submitted,

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THE MANN BROS CO.,
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JULIAN ARMSTRONG,
MONTAGUE FERRY.



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No. 367.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1922.

UNITED STATES OF AMERICA,
Appellant,

vs.

AMERICAN LINSEED OIL COMPANY *et al.*
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF ON BEHALF OF APPELLEES, AMERICAN LINSEED OIL COMPANY AND WILLIAM O. GOODRICH COMPANY.

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UNITED STATES OF AMERICA,
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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

The facts developed upon the trial are reviewed in the opinion of the court below and are presented with particularity in the brief filed by counsel for other defendants on this appeal. We shall not therefore burden the court with an extensive review of the evidence contained in the record but will limit our discussion of the facts and law to those points which we believe to be controlling.

POINT I.

THE OPERATION OF THE LINSEED CRUSHERS' COUNCIL DID NOT AFFECT THE MARKET PRICE OF LINSEED OIL. THE PRICE OF LINSEED OIL WAS DETERMINED BY THE MARKET PRICE OF FLAXSEED.

The record shows, without any evidence to the contrary, that prices, spot and future, of linseed oil are directly based upon prices, spot and future, of flaxseed; that flaxseed, like wheat and other commodities of like nature, is bought and sold on open exchanges and that fluctuations in flaxseed prices cannot be artificially controlled.

We believe that the important point in this case is the fact that prices of linseed oil are directly based upon the prices of the flaxseed from which the linseed oil is crushed. The flaxseed market is an open market and is a very active and fluctuating market. The crushers of linseed oil had no control over this market and the buyers of linseed oil in making their purchases were affected primarily by their judgment of the course of the flaxseed market. The Government's own witness Sulzberger testified that at no time during the operation of the council was the price of linseed oil disproportionate to the price of flaxseed. To demonstrate how overwhelmingly the facts stated above are supported by the evidence as well as by the decision of the trial court, we are quoting below excerpts from the opinion of the trial court and from the testimony of the witnesses who testified on the trial (both those called by the Government and those called by the defendants).

Opinion of Judge Carpenter (Record, pp. 43, 45-46):

"It appears further that the price of linseed oil is controlled by the price of flaxseed and that the flaxseed market is an open one in which there are wide fluctuations as well as inactive periods. * * *

* * * As the Supreme Court said in the steel case, a uniformity in price does not prove a conspiracy. * * *

Much has been made by counsel for the Government of the fact that prices of oil went up along with the price of flaxseed; that afterwards when flaxseed declined sharply, the price of oil did not come down at the same rate but declined at a much slower pace. The court will take judicial knowledge that for the past several months a decline in prices has been going on. The government has failed to show that the phenomenon of the price of oil declining at a slower rate than the price of flaxseed was not common in other lines, where the price of the raw materials has fallen. That the price of the finished product on a declining market will fall at a slower rate than the price of the raw material is natural, and therefore expected. The price of the finished material, under conceded economic rules in the market where there is competition, will depend upon the supply and demand of the finished material. The drop in the price of the raw material does not affect the supply of the finished material. Time must elapse before the supply of finished material is increased by the low prices of raw material and until the supply of finished material is increased, assuming that the demand remains constant, no decline in price may be expected."

Testimony of William Hoch, one of the Government's witnesses (Record, p. 53):

"I have a working agreement with Hirst & Begley which includes the price of the flax-

seed and the overhead expense and which also includes the working circumstances, etc., in making up the oil."

Cross examination of Mr. Sulzberger, one of the Government's witnesses:

"It has been my experience, even during the Armstrong régime, that flaxseed or the price of oil would fluctuate; that at periods it would be more stable—that is, it would run along when there would be more of an equality as to price—and that there would be other periods when there would be a variation in price" (Record, p. 61).

* * * * * * * *

"In selling my oil I attempt to follow the linseed market, but that is not always a good way, because I have seen flaxseed go up and oil come down and flaxseed go down and oil go up. The flaxseed market is a very feverish one. I cannot recollect any time during the period of the Armstrong Bureau when I thought the price of oil was out of proportion to flaxseed" (Record, p. 63).

Cross examination of Merritt Arthur Richardson, one of the Government's witnesses:

"I recall, as near as my memory serves me, that the high market for flaxseed during the period of the operation of the Armstrong Bureau was $6.40. You bet that did have something to do with the rise in the price of linseed oil. Every time it went up, up went oil. The price of linseed oil usually follows the price of flaxseed on an up market. It does not follow so readily on a declining market. It does follow a declining flaxseed market" (Record, p. 65).

Direct examination of John A. Mann:

"We get the flaxseed that we used in crushing our oil from the Canadian Northwest, our

Northwest, and the Argentine Republic. The markets in which we buy are the Duluth and Winnipeg markets and through importers in New York. The Duluth and Winnipeg markets are just such a market as the wheat market in Chicago, and there is not anyone connected with the crushing business who in any way controls or is connected with the flaxseed market. That market is an open free market or board of trade where we send our brokers into the pit just as you do in any grain market" (Record, p. 67).

* * * * * * * *

"Spot oil means delivery right away, and future delivery means delivery any time in the future that we agree upon. These two methods of sale and delivery of oil are in vogue generally in the linseed oil business, and the future business is the larger; but I could not give the percentage of how much larger it is. We would determine what price ought to be made for future deliveries of oil based on the current prices for future delivery in the seed market. If I sold a man today two carloads of spot oil and two carloads for future delivery, there might be a very decided difference in price. Spot oil might be very scarce, and spot seed might be very scarce and the price correspondingly high. In two or three months, with a new crop anticipated, there might be a lot of seed on the market and we would sell the oil for a much lower price based upon this future price for seed. I should say the price of oil has always been very responsive to the price of flaxseed. There might be an occasional exception, but that is the rule in the business" (Record, pp. 69, 70).

Direct examination of Samuel Mairs:

"Well, I should think that would cover the—the Archer-Daniels Company keeps a representative on the board of trade at Minneapolis, and we buy flaxseed on the grain

exchange. A great many times during the morning the representative calls up and gives us the price of flaxseed, which we use as the basis on which we figure our linseed oil costs. The elements entering into the determination of the price of linseed oil are the working costs and what we think we can get for the cake or meal at the time it is manufactured, depending upon whether it is a spot market in which we are selling the oil or a future market in which we are selling the cake" (Record p. 75).

* * * * * *

"We then get the market price on the flaxseed, figure out what the cost is and make our quotations" (Record p. 76).

"We don't buy the flaxseed until we have all the oil sold. We buy the flaxseed a little ahead of our sales. We don't aim to speculate on the flaxseed market, but we buy the flaxseed as near as we can at the time we sell our oil. If we sell a thousand barrels of oil, which we figure would take about twenty thousand bushels, we go out and buy twenty thousand bushels of seed to take care of it. The only end we have to speculate upon, then, is the rise and fall of the cake market. We have to base our calculations upon what we think we can get for the cake when the oil from that seed is manufactured. If we sell spot oil we try to buy spot seed, unless we have a good, big stock, and then we buy future seed.

If we sell future oil, we would naturally base our quotations on future options, which would eventually be traded for case seed or take delivery for future options. We also buy seed in the Argentine, some c. i. f. in New York and f. o. b. in Argentine" (Record pp. 77-78).

* * * * * *

"Q. Has that deception and misrepresentation as to prices resulted at times in your cutting of prices?

A. It all depends on the flaxseed market and what conditions are; it might" (Record p. 79).

Direct examination of Wm. O. Goodrich:

"I used the information that I got from the Armstrong Bureau to check up my own line of action as to whether or not I could afford to make a price such as was being quoted in connection with the cost and the price of seed" (Record p. 93).

* * * * * *

"My own price has always been a matter for me to determine, depending upon my anxiety to sell and my purchases of seed. I might have been fortunate in buying some seed before the price advanced, so that I was able to make quite a drastic cut without actually losing money, and when there was such circumstances, I did so" (Record p. 97).

* * * * * *

"I do not believe that it is possible to stablize prices in a business like ours, where there is a wide fluctuation in the raw material, often as much as 50 cents in a day, thereby causing the most erratic changes in value. It is quite impossible to talk about stablizing prices. You can not do it; there is no such thing possible" (Record p. 97).

Redirect examination of Wm. O. Goodrich:

"Inactivity in the market would naturally be emphasized when there was a very small amount of general buying, when the demand was small, when the prices of seed had remained stationary, and when there was plenty of seed and no particular reason for anybody wanting to load up with a large amount of

oil. Prices then would be stationary. The market for future oil would depend entirely upon the future seed market and the future cake market, and therefore depends a good deal upon speculation" (Record p. 99).

Redirect examination of Geo. A. Martin:

"From my experience and from my knowledge of flaxseed it is the slipperiest—excuse the slang—the slipperiest market that we know of or have anything to do with; I think as much so as on any commodity sold in the world" (Record p. 107).

Direct examination of F. Carlton Smith:

"We might change our prices twice a day, if we felt so inclined, and we have, in fact, done so during the time of the operation of the Bureau. Such rapid changes might have been due to fluctuations in the flaxseed market or to war conditions" (Record p. 109).

Direct examination of Louis M. Leffingwell:

"Our determination of the price to charge for oil depends on the price of flaxseed, the working cost, and what we get out of the meal" (Record p. 110).

Cross examination of Louis M. Leffingwell:

"I do not know a great deal about our joining the Bureau, except that I believed in cooperation and that where you get market information it is of advantage to you whether it is the price or what. It is the same as getting the cost of flaxseed every day from the chamber of commerce. If we did not know that we could not very well do business and compete" (Record p. 112).

Direct examination of F. K. Quine:

"In making our own prices we first took into consideration the cost of the raw material, the expense of manufacture, what we could get for our by-product, the cake or meal, and the result was the cost of linseed oil to us. If we could get cost, we would get it and a profit, if we could" (Record p. 115).

* * * * * *

"It would depend upon the time of year whether or not there would be any consistency in quotations of spot oil and future oil. For instance, some time between the 15th of May and the 15th of June we will plant a flaxseed crop in this country. Based on the acreage, flaxseed options for next fall may be considerably cheaper than the Case Market, and oil for October or September would sell at a much lower price than the spot oil. I think that the consumption of linseed oil in this country is normally 75,000,000 gallons. I do not know that it has increased in the last three or four years. In fact, I think the consumption last year and the year before was a little less, perhaps, than it was in previous years. The production of American flaxseed has ranged in the last nine years from 7,000,000 bushels to 34,000,000 bushels. In the 1912-1913 crop year I think we secured in this country somewhere in the neighborhood of 34,000,000 bushels. This year our crop will probably run a little under 11,000,000 bushels. The year before last, I think, our crop was in the neighborhood of 7,000,000 bushels" (Record, p. 116).

* * * * * * * *

"We get the seed which we crush from the American Northwest, from Canada and from Argentina. This year half of it will come from Argentina and the other half from Canada and the American Northwest" (Record, p. 116).

* * * * * * * *

"There are times during the advent of a new crop of flaxseed when the spot price differs very materially from the future price. The crop year starts in September. We would quote September-April, we will say, based on the price of the new crop of flaxseed, while August would remain in the spot or near-by situation" (Record, p. 119).

* * * * * * * *

"Q. Now, are you familiar, Mr. Quine, with markets for other commodities besides linseed oil—wheat, for instance? Do you read the newspapers, about wheat quotations?

A. Well, occasionally—only for the range with reference to the probable range of flaxseed, which moves usually in sympathy with wheat" (Record, p. 122).

Cross examination of Ralph B. Bolton:

"Whenever I saw a profit on the reproductive value of the seed I fixed a price to move the oil.

* * * * * * * *

The information as to prices was nothing new to me, as I knew what was going on in our territory all the time and would never be more than two or three hours behind any change of prices, however I might get the information. I never attempted to follow the market. I followed the flax market. I was out to sell oil at a profit wherever I could do so on the flax market" (Record, p. 124).

Direct examination of Charles T. Nolan:

"I have been with the National Lead Company for twenty-one years, and have been buying the oil for them for fifteen or sixteen years. During that time it has been my experience to find both fluctuation and spread in prices. I believe in the last two or three years the spreads have been even wider than they were previously. I certainly know that

to be the case with regard to the price fluctuations. There is a fundamental reason for that. This country reached its peak of production of flaxseed in 1908, and in those days it sold from $1.35 down to as low as 91 c. per bushel over a range of quite a few years. It follows, then, that with the production of flaxseed on a basis of $1.00 or $1.50 a bushel you will likely experience fewer fluctuations than when the flaxseed market ranges from $2.50 to $6.00 a bushel, as has been the case in the last few years'' (Record, p. 126).

Redirect examination of Charles T. Nolan:

"Q. The fluctuations which obtained previously to the formation of the bureau, were those somewhat reduced during the operation of that bureau?

A. No; I think, on the contrary, the fluctuations were very much wider during the operation of the bureau. As I explained, we had a level of raw material prices that were double, treble and even five times, six times as high as they were years back. That does not apply, however, to the time immediately preceding the formation of the bureau, the bureau operations, because we then had a high level of prices.

* * * * * * * *

A. No, for the reason that the fluctuations originate with the raw material end of the business, and as a matter of fact Providence has about 75 per cent of the responsibility of that, and I think human activities are 25 per cent, that is the speculative end. The production of flaxseed and the weather and transportation, all sorts of conditions that develop —really in my mind—if it is my opinion you are asking for?

Q. Yes.

A. Are responsible for a far greater part of the fluctuations in the flaxseed market than any human activities.

Q. That is from time to time?
A. Almost all the time.
Q. The fluctuations you speak of from time to time?
A. I mean all the time, because if it is not true in this country it is true in some other parts of the world. That is, while we are harvesting flaxseed over here they are marketing it somewhere else, and the market is on an international level always'' (Record, p. 128).

The representatives of the defendants whose testimony is quoted above, all held important positions in their companies and had been for many years in the business of manufacturing linseed oil. They knew when they entered the Linseed Crushers Council that linseed oil prices were directly related to and dependent upon flaxseed prices, and they knew that it was practically impossible to bring about any fixed prices for linseed oil. Their purpose in entering the Council was not illegal and the Record shows no illegal results followed.

Much was made at the trial of the Zoning System, of the attempt to standardize terms of sale, and other like activities. The Record shows clearly that all such action was taken only for the purpose of establishing a uniform basis for reports of the Council members. The exchange of market information would not have been valuable if quotations, reports and sales had not been made under the same conditions. But the fact that the defendants knew that no fixed prices could result shows conclusively that their activities, including the investigations and reports, of prices at variance with filed prices, were all aimed at obtaining correct market information—

information as to prices based directly on prices of flaxseed which were absolutely not subject to control.

POINT II.

THE MEMBERS OF THE LINSEED CRUSHERS COUNCIL DURING ITS EXISTENCE WERE ACTIVELY COMPETING AGAINST EACH OTHER, AND ALTHOUGH THERE WERE PERIODS DURING THE OPERATION OF THE COUNCIL JUST AS THERE HAD BEEN BEFORE THE COUNCIL WAS FORMED WHEN THE PRICES OF LINSEED OIL WERE UNIFORM, THESE PERIODS OF UNIFORMITY OBTAINED AT TIMES WHEN THE MARKET WAS INACTIVE AND DID NOT OBTAIN WHEN THE MARKET WAS ACTIVE AND SALES WERE LARGE.

An examination of the tabulated statements of daily prices of spot and future linseed oil quoted by the individual crushers (Record, pp. 183 to 252) will show that during the greater part of the operation of the Council there was a divergence in prices or spread in the quotations made by Council members. This spread was more marked in quotations for future oil (Record, pp. 210 to 252) than it was in quotations for oil for prompt delivery or spot oil (Record, pp. 183 to 209). As we shall show below the spread was greater in periods of activity in the linseed oil market when large quantities of linseed oil were sold, and prices were sometimes uniform in the quiet periods when linseed oil was not moving freely.

Much has been said in the government's brief of these periods of uniformity and of the fact that even when prices were not uniform several

of the crushers were quoting the same prices at the same time. Counsel for the government seems to forget that the crushing of linseed oil is an important industry which has been brought to a high state of efficiency, and many of the buyers and consumers of linseed oil are large organizations, mail order houses like Sears Roebuck & Company (Record, p. 52) and various paint, varnish, oilcloth, lineoleum and automobile companies (Record, p. 67). These large consumers keep in touch with the linseed oil market and buy very closely. Each of the large crushers has his sales representative in every important center who must deal with buyers who are also in touch with the representatives of his largest competitors. The sales organizations of the various linseed crushers must therefore of necessity acquaint themselves with their competitors' prices if they expect to carry on a successful business.

This being true it is not surprising that at times there was a uniformity of price and this court has held in *United States* vs. *United States Steel Corporation,* 251 U. S. p. 417, that uniformity of price alone is not evidence of an unlawful conspiracy.

It would be surprising indeed if each of the crushers at the same time had a different price. Obviously, the close buyers would all buy from the crusher having the lowest price. There would, in that case, be no competition; for linseed oil does not vary to any extent in quality (Record, p. 71). The crushers cannot sell their oil in general above the price named by their competitors and do not, of course, wish to sell it for less. In individual cases if a crusher who has bought his raw material favorably wishes to dispose of a considerable portion of his product he will under-

sell his competitors and obtain a large volume of business; if, on the other hand, his competitors have bought their materials at better prices and he believes that the market may advance, he will quote prices somewhat above the market and let his competitors obtain the business for the time being. But by and large both before the operation of the Linseed Crushers' Council, and during its operation the prices of linseed oil, like the prices of other market commodities sold in great quantities by manufacturers whose organizations were nation wide and efficient, did not show a great variance.

The exchange of price information has been criticised because the plan provided for the reporting of price quotations when the market went up as well as when it went down. We have pointed out above that the price of linseed oil is based upon the price of flaxseed. Flaxseed goes up as well as down, and if the individual linseed crusher in following the flaxseed market when it was going up did not know his competitors' prices he would be unable to meet his competitors' competition because if the competitor advanced his price five cents and he made a seven-cent advance, his competitor would obtain the business. It was therefore necessary for the individual crushers to obtain quotations of price changes when the market was going up as well as when it was going down.

POINT III.

THE CORRESPONDENCE BETWEEN THE ARMSTRONG BUREAU AND THE MEMBERS OF THE LINSEED CRUSHERS COUNCIL INDICATES CLEARLY THAT THE INDIVIDUAL COUNCIL MEMBERS WERE ACTIVELY COMPETING WITH EACH OTHER, AND THE VERY INSISTENCE BY THE INDIVIDUAL MEMBERS THAT THE REPORTS OF PRICE CHANGES SHOULD BE PROMPT AND ACCURATE NEGATIVES THE EXISTENCE OF ANY UNDERSTANDING OR AGREEMENT TO MAINTAIN ABRITRARY PRICES.

A very large part of the Government's brief (pp. 70 to 117) relates to the inquiries and exchange of views through market letters. This is practically all correspondence showing efforts to check up sales which had been reported at prices other than filed prices and complaints that prompt reports had not been made. Obviously if the members of the Council were to obtain information as to their competitor's prices it would be of no assistance to them unless the information was prompt and accurate. The efforts of the members to verify the accuracy of price changes made by their competitors indicates nothing more than that the individual members desired that the Council should do what it purported to do—keep each member constantly informed as to his competitors' prices.

As was stated by the sales manager of the American Linseed Company in his letter, dated March 19, 1919 (Record, p. 434):

> "As long as no deviation is being made from their published price by the Midland Company without notice, we are perfectly satisfied."

In other words, his interest was not in having the Midland Company maintain even its own price, but in having it live up to its contract with the Armstrong Bureau by notifying the Bureau in case "deviation is being made from their published price."

By the interchange of price quotations through the Council the members were endeavoring to obtain more accurately and more promptly than they had theretofore information as to their competitors' prices. Unless they knew the prices of their competitors they could not compete with them. It was, of course, possible by indirect methods for the crushers to obtain such information as to their competitors' prices. This was often done through some favored consumer who was friendly to a particular crusher and who would report price changes to this crusher after he had ascertained them by inquiry from the other crushers. This method of procedure was undignified. It was often inaccurate because the competitive crusher sometimes saw that the consumer was asking for quotations to report to some other crusher rather than as a basis for his own buying. Then too it was apt to be slow as the inquiring crusher was, of course, unable to insist that the consumer obtaining prices for him make prompt reports.

There was no privacy in the quotations made by the crushers. They were sent out to their trade when prices were changed and were freely made to any consumer whom they believed to be in the market for linseed oil; nor were the crushers so numerous that any consumer of a fair quantity of linseed oil could not obtain quotations from the various crushers selling in his territory and

thereby acquaint himself with the spread of their respective prices.

The operation of the Council in the exchange of price information, therefore, simply enabled the crushers to obtain reports more promptly and with more accuracy than they had done before the formation of the Council and enabled them to meet competition as soon as it appeared.

POINT IV.

THE GOVERNMENT'S ARGUMENT AT PAGES 124 TO 136 OF ITS BRIEF BASED UPON THE UNIFORMITY OF PRICES AT VARIOUS PERIODS DURING THE OPERATION OF THE COUNCIL IS PALPABLY MISLEADING.

As we have heretofore stated in our brief, there were times when the prices of spot and future oil were uniform. These were periods of inactivity in the market. The business done in spot oil during the active periods ranged from one-seventh to one-tenth of the business done in future oil. The uniformity was somewhat more marked in spot oil than in future oil.

This being so, the Government would have this court believe that there was a conspiracy or understanding to fix prices in spot oil which constituted perhaps one-fifth of the total amount of oil sold and that there was a conspiracy to control prices of future oil at a time when very little future oil was sold; in other words, that the Council functioned to regulate prices when very little oil was sold but did not function to regulate prices when great quantities of oil were sold; that because something less than

10% of the linseed oil, spot and future, sold was sold at a time when there was uniformity of prices in spot and future oil, there must have been a conspiracy to fix and maintain prices. Such an argument is, of course, preposterous. It seems to be born of the necessity of the situation. The fact that no attempt is made in the Government's brief to point out the quantities of oil sold when prices were uniform and the quantity of oil sold when there was a disparity between the prices of the various crushers, indicates an unwillingness on the part of the Government to present all of the facts. We give below a summary of the spot oil and future oil sold during active periods in the operation of the Council. This shows that future oil was sold in much greater volume than spot oil. We also give below the amount of oil sold during the periods when prices were uniform. A comparison of these amounts with amounts sold in corresponding periods when there was a disparity in prices will show how little weight in fact there is in the Government's argument along these lines.

In the weeks ending August 16, 1919, to October 11, 1919 (a period of 9 weeks), there were sold in Zone 2, 5,204,859 gallons of future oil and 453,659.80 gallons of spot oil. (Record, p. 278—totals of sales of spot and future oil shown on first table.)

In the weeks ending October 18, 1919, to December 13, 1919 (a period of 9 weeks), there were sold in Zone 2, 5,871,880 gallons of future oil and 716,363.8 gallons of spot oil. (Record, p. 278—totals of spot and future oil shown on second table.)

In the weeks ending April 19, 1919, to June 14, 1919 (a period of 9 weeks), there were sold in Zone 3, 6,097,365 gallons of future oil and 1,090,-924 gallons of spot oil. (Record, p. 282—totals of spot and future oil shown on second table.)

In the weeks ending June 21, 1919, to August 16, 1919 (a period of 9 weeks), there were sold in Zone 3, 4,400,750 gallons of future oil and 773,856 gallons of spot oil. (Record, p. 283—totals of spot and future oil shown on first table.)

In the weeks ending August 23, 1919, to October 18, 1919 (a period of 9 weeks), there were sold in Zone 3, 5,086,790 gallons of future oil and 706,522 gallons of spot oil. (Record, p. 283—totals of spot and future oil shown on second table.)

In the weeks ending October 25, 1919, to December 13, 1919 (a period of 8 weeks), there were sold in Zone 3, 6,273,700 gallons of future oil and 954,562 gallons of spot oil. (Record, p. 284—totals of spot and future oil shown on first table.)

During all of the periods mentioned above there was a competitive spread in prices quoted by the crushers for future oil, except in one or two instances on isolated days. It will be seen that the sales of future oil in the periods of activity were from 6 to 11 times the sales of spot oil.

For purposes of comparison with the active periods, we give below the totals of sales of spot and future oil during the inactive periods when prices were uniform.

In the weeks ending November 30, 1918, to March 1, 1919 (a period of 14 weeks), there were sold in Zone 1, 950,509 gallons of spot oil and 402,400 gallons of future oil, a total of 1,352,909 gallons (Record, pp. 270-271,—totals of sales of spot and future oil shown in the last column of first table on page 270 the 9 columns of second

table on page 270 and 4 first columns of first table on page 271).

In the weeks ending November 30, 1918, to March 1, 1919 (a period of 14 weeks), there were sold in Zone 2, 507,650 gallons of future oil and 751,406.33 gallons of spot oil, a total of 1,259,056.33 gallons (Record, pages 275-276,—totals of sales of spot and future oil shown in last column of first table on p. 275, the 9 columns of the first table on page 276 and the first 4 columns of the second table on page 276).

In the weeks ending November 30, 1918, to March 1, 1919 (a period of 14 weeks), there were sold in Zone 3, 844,750 gallons of future oil, and 1,208,397 gallons of spot oil, a total of 2,053,137 gallons (Record, pp. 281-282,—totals of sales of spot and future oil shown in last column of first table on p. 281, the 9 columns on second table on p. 281 and the first 4 columns of the first table on p. 282).

It therefore appears that, considering the amount of linseed oil, spot and future, sold in Zone 2 and Zone 3 (being the largest zones and fairly representative of the proportion), about four times as much oil was sold in these two zones in the nine weeks' period, when sales were active, as was sold during the fourteen weeks' period when sales were inactive; or in other words, that the weekly average of sales in these inactive periods were less than one-seventh the weekly averages during the periods of activity in Zone 2 and one-fifth the weekly averages in the active periods in Zone 3. Indeed, the record shows that in the week ending October 11, 1919, Spencer Kellogg & Sons, Inc. (subscriber No. 12), sold 1,436,000 gallons of future oil in Zone 2. This was a greater

amount than the 1,259,056.33 gallons of linseed oil sold by all the crushers in Zone 2 in the fourteen-week inactive period from November 30, 1918, to March 1, 1919.

The illustrations we have given above show the true relationship of the periods of uniformity to the other periods. When the flaxseed market was active and linseed oil was sold in large quantities, there was a spread in the prices quoted by the crushers, and price changes were frequently made. When the market was inactive and the oil was only marketed in relatively small quantities, price uniformity was more frequent. But this state of affairs was not peculiar to the operation of the Linseed Council. It had existed before the Council was organized and it exists in other industries where the competing sellers have large organizations and where the competing buyers have the means of keeping in close touch with the seller's prices.

POINT V.

THE DECISION OF THE COURT BELOW TO THE EFFECT THAT THE FACTS ADDUCED AT THE TRIAL DID NOT CONSTITUTE A DIRECT AND UNDUE RESTRAINT OF COMPETITION AMONG MEMBERS OF THE LINSEED CRUSHERS COUNCIL, SUPPORTED AS WE HAVE SHOWN BY A GREAT PREPONDERANCE OF EVIDENCE, IS ENTITLED TO GREAT WEIGHT IN THIS COURT.

The greater part of the government's brief is an attack upon the findings of fact of the Trial

Court. The government attempts to overcome the direct evidence given in favor of the defendants upon the trial both by witnesses for the government and by its own witnesses by assembling scraps of evidence and basing on them inferences and surmises. We are confident, however, that the record as a whole conclusively supports the judgment of the Trial Court; for it can not be gainsaid that the prices made by the individual crushers were at no time arbitrary prices when considered in relation to the market prices for flaxseed; that no attempt was made to interpret statistics for the purpose of arriving at a composite or uniform price or for the purpose of urging the crushers to raise their prices; that there was no effort made to curtail production (the evidence in fact shows that no rise in price occurred because of curtailment in production, except as far as such curtailment was necessitated by a shortage of flaxseed); that there was no attempt by the crushers to reach any understanding or agreement as to prices or to determine price policies. There being evidence in favor of the defendants on all of these points we believe that this is a proper case to invoke the rule that the findings of the Trial Judge who saw the witnesses and heard their testimony are entitled to great weight on appeal.

U. S. v. *United Shoe Machinery Co.*, 247 U. S. 32;
Adamson v. *Gilliland*, 242 U. S. 350;
Davis v. *Schwartz*, 155 U. S. 631;
Tilgham v. *Proctor*, 125 U. S. 136.

We respectfully submit that the judgment of the court below dismissing the bill of complaint was right and should be affirmed.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1922.

No. 307

UNITED STATES OF AMERICA,
Appellant,

vs.

AMERICAN LINSEED OIL COMPANY, et al.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF OF WM. J. MATTHEWS AND HUGH T. MARTIN, AS AMICI CURIAE.

WM. J. MATTHEWS,
HUGH T. MARTIN,
as Amici Curiae.

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BRIEF OF WM. J. MATTHEWS AND HUGH T. MARTIN, AS AMICI CURIAE.

INTRODUCTION.

Have American business men the right to collect and exchange market news with regard to their own business or industry? Does the collecting and exchanging of such market news tend to restrain trade or to promote it? Can men get such information only from a newspaper or from a government bureau, or have they the right in the collection and distribution of market news to act co-operatively? These are the fundamental questions involved in this case.

The facts in and of themselves are simple, and as to them there can be little controversy. But from these facts counsel for the Government, in order to show a violation of the Anti Trust Law, make deductions of economic theory which are unsupported by the standard authorities in the field of political economy, and which

are contrary to the practical experience and observation of business men. To brand these defendants as criminals, it has been found necessary to make statements which are unsupported, and which in the nature of things must continue to rest on the *ipse dixit* of the counsel for the Government.

We will therefore crave the indulgence of the court for quoting freely from the standard writers on political economy in our endeavor to show the real nature of the organization known as the Armstrong Bureau of Related Industries, its purpose, the economic need for the service which it performed, and the actual results from its operation. We shall endeavor to show that it was not in its essence different from other economic agencies which have been in operation for many years, many of which, at enormous expense are being operated by the Government itself; that it was the usual and not the strange or bizarre in the business world, and that the necessary as well as actual result of its operation was to facilitate and develop trade and commerce in linseed oil, and not to restrain it.

The Linseed Oil Industry.

Linseed oil is made from the crushing of flaxseed, and the producers are sometimes herein referred to as "Crushers." Flaxseed is the principal ingredient, and the cost of flaxseed constitutes approximately seventy-five per cent of the cost of linseed oil. A by-product in the nature of cake or meal, results from the crushing of the seed, and is sold for feed for live-stock. Cake or meal is what is left after the oil has been extracted from the flaxseed.

Flaxseed is raised principally and almost exclusively in Minnesota, the Dakotas and Canada, and the Argentina,

South America. The raising of flax is hard on the soil, and consequently cannot be grown successfully many years in succession upon the same land. It is a crop that is peculiarly susceptible to climatic and fertilizing conditions and requirements, and consequently less regular and dependable even than most other crops. Some years there are almost total crop failures of flaxseed, either in one or the other of the countries of the U. S. and Canada or the Argentina. The leading crushing plants are located in Minneapolis, Buffalo and New York City. Other plants, somewhat smaller in size, are located at Milwaukee, Chicago and Cleveland, and still smaller ones in other cities, chiefly in the middle western states. The defendants, Sherwin-Williams Company, Cleveland, Ohio, and the National Lead Company, New York City, are large manufacturers of paint. The crushing of linseed oil is the smaller part of their business. The former produces about 30,000 to 40,000 barrels of oil a year, and consumes and sells, combined, between 75,000 and 100,000 barrels. In other words, that company buys between 60 and 70 per cent of the oil it consumes and sells. The National Lead Company purchases about 35,000 barrels, crushes about 75,000 barrels, and consumes about 50,000 to 55,000 barrels. In other words, this company buys and crushes in all a little over 100,000 barrels annually, and uses in the manufacture of paint and lead one-half of that entire amount, and sells the remaining half. It buys one-third of its entire requirements. The two companies do not sell to middlemen, but principally to dealers and consumers and hence their sales are nearly, in all, about 90 per cent for spot or immediate delivery; they sell practically none for future delivery, and only on quotations; they do not have price lists.

There is an open market for flaxseed at Minneapolis, Duluth and some other points. There is no open market

for linseed oil. The flaxseed market is regarded as
"feverish" market, and frequently evidences violent a
wide fluctuations. The peak of flaxseed production w
reached in the United States in 1908, and the price
flaxseed for several years after that year ranged betwe
91c and $1.35 per bushel. Whereas for several yea
prior to and including 1921 flaxseed was from $2.50 to
a bushel.

Linseed oil is sold for spot, immediate delivery, and f
future delivery. The larger amount is sold for futu
delivery. Large buyers enter the market usually twi
and sometimes three times a year. They buy in the su
mer for the fall and the winter; and they buy in the f
for the spring. The periods intervening are inactive.

When there is a good crop of flaxseed in this countr
most of the crushing is done in Minneapolis. On t
other hand, when there is not as good a crop in this cou
try as there is in Argentina, the crushing is done pri
cipally in New York and Buffalo.

STATEMENT OF CASE.

On June 30, 1920, the United States District Attorney for the Northern District of Illinois, filed a bill in equity on behalf of the United States alleging that these defendants had entered into a conspiracy in restraint of trade and commerce as forbidden by the Sherman Anti Trust Act. Full answer was made by the various defendants, and the case came on for hearing before Honorable George A. Carpenter, Judge of the United States District Court. A full hearing was had, many witnesses were heard, and much documentary evidence was also submitted. Elaborate written as well as oral arguments were submitted to the court and after some months of consideration, Judge Carpenter reviewed the evidence in a very clear opinion, found that there was no conspiracy in restraint of trade on the part of the defendants or any of them, and that the information which was collected through the medium of the Armstrong Bureau was of the nature of *"Market News"* which of necessity men must collect and use in any business, if they are to compete; that there was no evidence of its misuse; that the Armstrong Bureau was what it claimed to be, a bureau of intelligence and that it tended to promote real competition, rather than to restrain it. The court therefore dismissed the bill for want of equity.

Thereupon, the Government appealed to this court.

The allegations of this bill charge that the defendants had agreed, combined and conspired to restrain interstate trade and commerce in linseed oil, by suppressing competition in prices, enhancing prices and retarding the lowering of prices in violation of the Anti-Trust Act.

In support of these charges, the Government claims to have shown the following:

First: That the defendant, Julian Armstrong, under the name and style of Armstrong Bureau of Related Industries, entered into a series of similar contracts with the other defendants, called "Subscribers," providing for the carrying on of certain co-operative activities, pertaining to the linseed oil industry, and including the collection and distribution of market facts, chiefly:

(1) Current quotations on linseed oil.
(2) Daily sales reports showing quantity, kind, price, terms and whether for immediate (spot) or future delivery.
(3) Weekly sales compiled reports, showing total sales for each subscriber for designated areas or zones.
(4) Monthly reports of stocks of oil, cake or meal on hand not covered by sale or contract.
(5) Special information upon request for the purpose of verifying the correctness of the reports previously filed or through inadvertence, or otherwise, not filed.
(6) General information pertaining to the industry.

Second: That the Bureau agreed to collect and distribute such information and perform such services as required by the terms of the contract, for a consideration.

Third: That in accordance with these contracts the subscribers filed with the Bureau their individual price lists, and promptly by telegraph notified the Bureau of any changes or deviations therefrom, and also furnished the other facts prescribed by the contract. That these facts were promptly sent out to the subscribers by the Bureau.

Fourth: That the Bureau on various occasions reprimanded subscribers for making sales of oil at less than

the price quoted by the subscriber and filed with the Bureau, and thereafter failing to notify the Bureau as to the new price.

Fifth: That certain statements of Julian Armstrong or his Assistant Montague Ferry, and possibly of some others in favor of "stabilization of prices" and of "constructive competition," whatever those phrases may mean, showed an intention to limit competition among the subscribers.

Sixth: That the United States and Canada were divided into nine zones, and that the differentials in prices, made in the respective zones, were arbitrary, and not based on the differences in the cost of transportation.

Seventh: That the subscribers held monthly meetings for the purpose of discussing matters pertaining to the industry.

Eighth: That the inevitable effect of such operations was to restrict and limit competition among the subscribers, and bring about a narrower spread in prices than existed before or after the activities of the Bureau, and that prices were thereby enhanced, maintained and the reduction thereof retarded.

BUT THE FOLLOWING FACTS ARE ALSO TO BE NOTED:

First: The information collected by the Bureau and distributed to the subscribers was what is known as "Market News," and was of the same kind and character which every prudent man, be he business man or otherwise, secures or endeavors to secure, before entering into any business transaction, whether it involves much or little in amount, and information which is absolutely essential in order that there be competition.

Second: The information collected and distributed by the Bureau was TRUE. There is no allegation or claim that

any statements of fact or of statistics were false, or that any facts were withheld or suppressed.

Third: There is no allegation or proof that the price lists filed from time to time with the Bureau were not *bona fide* individual price lists, made in the regular course of business and *already offered to customers or prospective customers.*

Fourth: There is no allegation or proof that the subscribers at their meetings or elsewhere discussed prices or made agreements with regard to prices.

Fifth: There is no just claim and no evidence that prices asked by any of the subscribers during the period the Bureau was in operation were too high, or not in accordance with the market price of flaxseed on which the price of linseed oil is substantially ultimately based.

Sixth: With the exception of one customer, whose financial credit was admittedly reasonably questioned, no customer came forward with any claim of unjust treatment, and no competitor came forward with any claim of unfair or unjust practices, or unfair methods of competing.

Seventh: There is no claim and no evidence that the subscribers in any way limited production during the period of the operation of the Bureau. It is expressly conceded by the Government that there is no charge of curtailment of production (Rec. 72).

Eighth: There is no claim and no evidence that the subscribers by agreement of action, or implied agreement, refrained from seeking business which was being sought by other members of the Bureau.

Ninth: There is no claim and no evidence that the subscribers of the Bureau by agreement or otherwise limited themselves to any section of the country, or in

any way divided up the business, or entered into any "pooling" operation.

Tenth: There is no showing and no evidence to the effect that any subscriber was under any obligation or constraint legal, moral or social, or that any subscriber had any understanding to ask higher prices, or maintain prices, or limit production other than *is claimed* to have been *implied* by reason of, or because of the *mere exchange of information.*

Eleventh: There is no showing and no evidence that the prices asked by the individual subscribers of the Bureau were not the prices fixed by them individually upon their own final judgment as to the factors, including going prices, which affect supply and demand.

Twelfth: There was no showing that the effort to establish zones was not a sincere effort to reasonably set forth the differences in freight rates between the different parts of the country, and it was further clearly shown that the subscribers at all times were willing to sell the customers either f. o. b. the mill or f. o. b. the place of the customer, so that if for any reason the purchaser believed that the zoning system was unfair to him, he could pay the price at the mill and pay his own freight.

Thirteenth: There is no evidence that any subscriber to the Bureau had any understanding either with the Bureau or with any of the subscribers, to ask higher prices or maintain prices or limit production.

Fourteenth: There is no evidence that the prices asked by the subscribers to the Bureau during the period in question were any higher, if they were as high, as the prices of other crushers of linseed oil who were not subscribers to the Bureau.

Fifteenth: There is no showing and no evidence that the alleged tendency toward stabilization or uniformity

of price on any given day, was not due to the competition between the subscribers in accordance with economic law and not to a lessening of competition between them.

Sixteenth: There is no evidence that a rise of prices restrains trade or commerce when the resulting higher prices are in harmony with economic conditions and are not caused by monopoly, suppression of competition or some other artificial factor.

Seventeenth: The Bureau operated from October 1, 1918, to June 30, 1920, a period of twenty-one months, during all of which time prices of every commodity, stocks and bonds rose rapidly, and to very high points.

Eighteenth: There was nothing secret about the activities nor the operations of the Bureau.

WHEN THESE FACTS ARE CONSIDERED IT BECOMES CLEAR THAT THE EVIDENCE FAILS TO SHOW THAT THE ARMSTRONG BUREAU, BY AGREEING TO FURNISH TO ITS SUBSCRIBERS MARKET NEWS WITH REGARD TO THE LINSEED OIL INDUSTRY WAS A PART OF A CRIMINAL CONSPIRACY IN RESTRAINT OF TRADE OR COMMERCE, BUT THAT SUCH A CLAIM IS A PURELY GRATUITOUS ASSUMPTION, FOUNDED ON SUSPICION AND A MISUNDERSTANDING, IF NOT A DISREGARD OF BUSINESS METHODS AND ECONOMIC LAW.

ARGUMENT.

At the very outset of this argument, we propose to discuss the nature of "Market News" to show its necessity and its true function. We propose to show the relation of market news to prices, and that it is a prerequisite to competition. We propose to show that the Armstrong Bureau was a proper agency for the collection of market news, that it did not in any way restrain trade or commerce, and that it did not engage in any practices injurious to the public or forbidden by the law.

In order that the court may know that we are not ourselves manufacturing economic theories to meet the exigencies of the occasion, we shall quote freely and at length from standard writers on economics and especially of that phase of distribution known as Marketing. In the light of the established fundamental principles as by them set forth, we shall then discuss the specific facts in this record.

I.

MARKET NEWS IS THE VERY BASIS OF COMMERCE.

The principle is clearly set forth by the great English economist, William Stanley Jevons in his work, "The Theory of Political Economy," page 84:

> "It is of the very essence of trade to have wide and constant information. A market, then, is theoretically perfect only when all traders have perfect knowledge of the conditions of supply and demand, and the consequent ratio of exchange" (that is of price).

In his very able book "Marketing, Its Problems and Methods," published in 1920, C. S. Duncan, Ph.D., some-

time Assistant Professor of Commercial Organization in the University of Chicago, discusses market news under the heading "Trade Information." His discussion is in part as follows:

> "An ingenious Englishman presented a paper, copiously illustrated, before the Royal Society of Science in 1699, dealing with a new invention which he had just made. This invention was a huge megaphone, or 'speaking trumpet,' set up on standards, and it was devised for the purpose of communication at great distances. A sovereign, it was claimed, could stand on some promontory in the midst of his realm and send his voice to its farthest corner; he could stand on the shore and command his ships far out at sea; he could issue proclamations and control activities of peace as well as give orders to his vast armies in times of war. News of disaster or success could be conveyed instantly from one section of the country to another. In fact, the 'stentorophone,' as it was called, was to become an instrument for making possible an instantaneous transmission of news.
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> "The 'stentorophone' would not work, of course, but its inventor had undoubtedly caught a glimpse of the significance of a great idea—that information, knowledge, news, is a vital element in both peace and war. In no part of human activity is this element of information more important than the economic, and especially in that most sensitive of all economic mechanisms, the market. There, knowledge is literally power. Market news is the nervous system of the market.
>
> "What is Trade Information—'All news is market news,' said one of the leading crop experts of the country. Whatever has any effect upon the market price is trade information. This means that any event which changes in any respect the supply of or demand for any commodity is market news. The event does not need to be economic in character; it may be a political or social event abroad. Whatever influences trade and trade relationships is market news. But such event is not really in itself market news; it becomes so as it passes through the mind

of the business man where it is transmuted from an historical incident into trade information. The facts are the raw materials; the business man's interpretation of them is the market news. For market news is nothing more than the reports of events and happenings of the world acted upon by a trained and experienced business mind.

"Of market news, time is the essence. For, in the bargaining process superior knowledge may be secured in two ways; it may be a broader, sounder, more comprehensive knowledge, or it may be an earlier knowledge. As a market becomes more and more thoroughly organized, competition in knowledge tends to be narrowed to securing an earlier knowledge. A marvelously efficient organization has been developed as a result of this sort of rivalry, and has concentrated itself in the organized exchanges. As has been shown already, the activity most frequently associated with organized exchanges is dealing in 'futures,' and to deal intelligently there must be a broad and sound basis of knowledge. The very sensitiveness of exchange prices is due to their immediate response to market news.

"The facts secured from all parts of the world by the exchange brokers pass through the minds of these seasoned and expert traders and are there transmuted into market news. A drought in Argentina, a flood in China, a volcanic eruption in the Antipodes, will be instantly translated into dollars and cents in the prices of commodities. Knowledge of facts, then, that can be judged on a price basis is market information.

"Function of Market News.—The physical world turns on its axis. The ancient mind conceived of it as being pivoted on the shoulders of a giant, Atlas. It is a 'going concern,' whose activities are adjusted by certain forces. There is a loose analogy here with the world of business. It, too, is a 'going concern.' Like the physical world, it turns on its axis and pivots on the shoulders of its Atlas. The pivot and the axis of the business is price; and the essence of price is market news.

"Practically, the consumer usually pays the price that is asked by the seller in the retail trade. He does not know enough facts, either as to cost or as to

quality, to bargain on an equality with the retailer. He must make his decision to buy or to refuse to buy on the basis of relative marginal utility. The price is asked, and the consumer either decides the article is not 'worth' it or another article will do. In other words, the buyer and seller do not build a price anew, from the ground up, by any sort of higgling. Business is a going concern and today's price is yesterday's price modified only by some bit of market news. Tomorrow's price will be today's unless changed by some kind of market news. The center and core of modern business transactions is market news, operating through price changes.

"Price setting is a process of adjustment, called bargaining. The basis of bargaining is market news. It is this that keeps the prices balanced to market conditions, whether local, national or international. Some foodstuffs have a world market; their prices are adjusted to world conditions. Everybody knows that the world must eat; the demand is ever present, insatiable. Any substantial decrease in supply brings, as from the dead, the specter of want. It is desirable that foodstuff markets be stabilized as much as possible. The only way to stabilize markets is to stabilize price, and the only way to stabilize price is to make known instantly all the essential facts about supply and demand.

"There is the classic story of the elder Rothschild who laid the foundation of the great fortune of that prosperous family. He is said to have been an eyewitness of the battle of Waterloo. Previously, he had arranged for a relay of horses to carry him with the quickest possible dispatch from his post of observation to the Channel and from the Channel to London. He watched the ebb and flow of the tide of battle until the decisive moment came, until the final outcome became manifest. Then he started for London, riding night and day until he reached his destination. For what purpose? To buy stocks on the Exchange. He carried momentous market news. While that news was his alone, he had a monopoly, and on this brief monopoly he laid the foundation of a vast fortune.

"The world is not different today in its essential business organization. It still pivots on price and

the essence of price is still market news. Consider the economic significance of the telegraph, the telephone, the wireless, the newspaper, the postal system, the airplane. Much has been written of these things to show their marvelous ingenuity and convenience. They have broadened the horizon and have brought the ends of the earth nearer together. But greater than all of these things for the welfare of the world is the fact that they carry news of such dynamic force in business. Local markets through them have broadened into national and international markets; local prices through them have become national and international prices.

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"The price of to-day is not a brand new, handmade or machine-made price. It is the interpretation into terms of money of the world condition; it is the best expert opinion of market news.

"It may be seen, therefore, that market news is the central organizing force in the market, because it is the essence of market price. It functions as an organizing force through all middlemen, through warehouses, organized exchanges, the wholesale and the retail system.

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"Markets are organized for two purposes: One is the actual handling of the commodities, the real process of distributing goods; the other is buying and selling. For intelligent buying and selling, market news is essential. It serves more and more this vitalizing, directive function.

"ORGANIZATIONS FOR SECURING MARKET INFORMATION—For performing this necessary function many kinds of organizations have developed. On the basis of control these organizations are of two different types: (1) governmental, and (2) private.

"*Governmental Organizations*—There are many Government bureaus for securing and circulating market information. The oldest and best known of the bureaus is the Bureau of Crop Estimates, originally called the Bureau of Statistics, in the Department of Agriculture. On February 25, 1863, the first appropriation of $90,000 was made for a Department of Agriculture. Two years later, 1865, the first dis-

tinct provision, $20,000, was made for a statistical bureau. By 1911 the appropriation had reached $225,000.

"The Bureau of Crop Estimates gathers statistics on the four great staple crops—corn, cotton, wheat and oats—and issues monthly reports. These reports cover the following three points: (a) the area in acres planted or sown, (b) condition of crops, examination being made monthly during growing season, and (c) the yield per acre at harvest time. Beginning the first of each month a gathering volume of reports will flow from 150,000 or more men conversant with conditions throughout the productive areas, toward the office of the chief of the bureau of Crop Estimates. They will carry the conditions as of the first of the month. The facts will be tabulated, State by State, section by section. Then as the eighth of the month draws near, the doors of the rooms where the material is kept are locked; door-keepers are stationed outside; even the telephone is disconnected. The statistical experts are marooned as if they had the plague.

"The reports on these crops are usually 'loosed' at two thirty in the afternoon. As this time approaches, in the corridors are gathered fifteen or twenty newspaper reporters. With them are the operators of the telegraph system, whose instruments stand ready at hand. One minute before the hour set, the doors are unlocked and out step the Chief of the Bureau of Crop Estimates and the Secretary of Agriculture. The Chief holds in his hand 25 typewritten copies of the completed report. Some of these are spread on a table, printed side down. Folded copies are handed to the telegraph operators, and they are not unfolded. Each newspaper man is then permitted to place his hand on a copy, ready to grab and run. As the hands of the clock reach the appointed hour, the Chief of the Bureau shouts 'Go.' Within less than five seconds every reporter has disappeared; every available telephone is in use, and the telegraph wires are humming the message of that report. Within fifteen or twenty seconds it is being read in Chicago, New York, New Orleans, and thence spreads with the speed of skillful fingers tapping

telegraph instruments, public and private, over the continent and across the seas.

"Why all this careful guarding? What is the dynamic power in this simple report? The answer is: 'Market News.' This report carries the summation from 150,000 different sources of facts about crop conditions, of corn, cotton, wheat, and oats, the four great speculative crops. The world price is made of such stuff. It helps to keep that price balanced to world conditions; it aids in holding that price down to a minimum, because buyer and seller both know the facts, because the whole world may know them, because it becomes world news and rumor is killed.

"This is only a part of what the Government does for the collection and dissemination of market news. The Bureau of Markets, 'to give producers, dealers, and consumers more complete and accurate information regarding current production market receipts, accumulations both in and out of storage and market demands,' has developed a market news service respecting such commodities as grain, hay, seeds, eggs, poultry, cheese, onions, cabbage, and lettuce, as well as meats and meat animals. 'These reports tend very materially to steady market conditions by giving the producers dependable information on which to base their business operations.'

"The Bureau of Foreign and Domestic Commerce collects facts about foreign markets and gives them out to interested parties. The U. S. Geological Survey gathers data on the production and on the deposits of minerals and ore. The Department of Forestry secures data on timber and lumber supplies. In one form or another the Government reaches out into most lines of interest and serves as a medium of market news. Of no small importance is the Daily Weather Report.

"For the great fundamental crops there is an international organization. It was instigated by an American economist, David Lubin, and finally organized in 1909. It is called the International Agricultural Institute, and has its seat in Rome. The work of this Institute is carried on by money appropriated by the leading nations of the world, and the information on the fundamental crops is sent broad-

cast monthly. This is not only one of the great world price stabilizers, but is likewise a great bulwark against want and famine. It aids in distributing these essential commodities as they are needed, territorially and chronologically.

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"*Private Organizations*—Private organizations for securing business data permeate the industrial and commercial world. The most highly organized of these is probably that of the grain brokers. In such trade centers as Chicago, these brokers have the headquarters of organizations reaching throughout the grain-growing regions. There are experts who make telegraphic reports from time to time on crop conditions, and especially during the critical seasons. The appearance of Hessian fly, or rust, or other pest is quickly noted and discounted in the speculative market price.

"The largest private news agency in the grain trade is probably Broomhall's. It has official representatives in all of the great exchanges. 'Advices' are received from agents, daily and weekly, by mail, wire and cable. There are more than 300 expert agents scattered through the grain producing countries. Liverpool is the clearing house for it. News can be sent by it from New York to Liverpool and be posted in six minutes. Among private organizations this agency corresponds to the International Agricultural Institute in governmental organizations. A similar organization for cotton is found in the International Cotton Conventions.

"Stock Brokers also have news gathering and news distributing organizations. This service is largely their stock in trade. When it is recalled that these stock brokers are dealers in contracts, the reason is plain. They need to know more about the market, about demand and supply, than their clients.

"Every commodity of sufficient importance industrially and commercially will develop its own trade-information agencies. There is in the United States the Iron and Steel Institute. Abroad, in England, France, Germany, there is a similar organization. The oil interests keep many experts busy with their investigations with a clearing house in the Petroleum Institute.

"Market news is often an incidental service performed by organizations formed primarily for other purposes. This is true of the trade associations that have multiplied so rapidly in recent years. There are now literally thousands of such associations, each with its central headquarters from which emanates trade information. Many secretaries of these organizations send out news letters, call conventions, make investigations, and otherwise try to keep their members in the vanguard of progress. The trade journals issued by these organizations contain much trade news. Some of them are published solely for that purpose.

"There are many research departments, both in the trade associations and in the larger businesses, whose prime motive is to furnish pertinent trade facts. They are agencies of market news. Banks have organized research departments also, and for the same purpose. Special research companies have recently sprung up to serve as sources of market news.

"Special market-news magazines and papers are published. The *New Orleans Cotton Exchange Reporter, Dun's Review, Bradstreet's Review, Broomhall's Corn-Trade News,* commercial and financial and industrial magazines all carry market news, as fresh and up-to-date as possible. The daily papers have their market news sections.

"Thousands upon thousands of letters are daily carried by the mail crammed with market news. The correspondence of the world is doubtlessly very largely made up of trade information. Just as advertising—which, by the way, is a form of market news service—keeps the newspapers and magazines going financially, so trade-information correspondence saves a deficit in the Post Office Department. It is not competition, but market news, that is the life of trade.

"The economics of the telegraph system has not yet been written. Nor has that of the telephone system or the wireless been written. Much has been said about the laying of ocean cables, but the romance has been emphasized more than the economic significance. Cables, telegraph wires, telephones,

and wireless outfits bring market news from the ends of the earth. In the world markets, the nation that controls the cable systems has the means of controlling the markets. British supremacy in foreign trade was founded not alone upon a merchant marine and foreign investments, but also upon her world-encircling cables. Adequate overseas communication is as important as ships and foreign banks to successful foreign trade.

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"Steamboats carried news faster than the old sailing vessels. The cable easily outdistances the steamer. But the cable lines are relatively expensive and afford only a restricted means of communication. Only recently another possible means of transoceanic communication has been opened up. An airplane successfully crossed the Atlantic in a single flight. An airship has made a successful round trip.

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"Essential market news is served luxuriously in hotel, club, or office by means of that marvelous little instrument called the 'ticker.' Hitherto, these tickers have been the quickest method of transmitting news widely. A private telegraph or telephone wire gives equal speed, as well as privacy, but a single master transmitter can send the important news out to many of these little tickers instantaneously. 'The service gives out news to the "Street" where it is most needed, for without an up-to-the-minute knowledge of what the outside world is doing, rumor is much more likely to affect the sensitive market. The newspapers with their hourly editions do not come often enough. The news must come hotter and faster than these possibly can.'

"THROUGH ALL OF THESE MEANS, PRIVATE AND GOVERNMENTAL, TRADE INFORMATION IS COLLECTED AND DISTRIBUTED. GRADUALLY FASTER AND FASTER METHODS HAVE BEEN DEVELOPED, UNTIL NOW THE NEWS FLIES ALMOST WITH THE SPEED OF LIGHT. THIS MARKET NEWS SYSTEM HAS BECOME THE VERY CORE OF THE MARKET ORGANIZATION, IN EVERY RESPECT AS ESSENTIAL AS THE RAILROAD OR THE WAREHOUSE.

"Essentials of Market News—There are two general phases of trade information; one has to do with production, the other with the demand. In those essential products with a world-wide and relatively inelastic demand, the attention turns toward production. Thus, crop reports sent out by the Government deal with (1) acreage planted, (2) condition of crops during growing season, (3) yield per acre, (4) total production, (5) average price per bushel, (6) total farm value, (7) stocks on hand at given times, (8) amount shipped out of country of production, (9) concise statements of weather conditions throughout the productive area, and (10) the 'visible supply.'

"As has been pointed out before, it is important to trace the relation between the volume of production, the total value, and the visible supply. This last term signifies, in general, the amount within sight of the market; that is, the amount in elevators, on board cars, loaded on ships, etc.—the amount that has been chartered. The visible supply becomes increasingly important as the end of the crop season draws near. The amount of wheat left at the end of May, the bales of cotton remaining after August 31, the number of bushels of corn left after September, show the real surplus of the previous crop to compete with the new crop.

"For other commodities, other points may rise in importance. The driving of new oil wells, the opening of new mines, the total production of ore, coal, lumber, the recent estimates by experts of remaining supplies, are all pertinent.

"But production figures are significant only in relation to demand. This may mean the demand for finished products reflected back to raw materials. It certainly includes the results of a careful analysis of the market. The chief elements of this analysis have already been discussed. The principle to keep in mind is that any pertinent fact, touching either the production of a commodity or its consumption, is trade information, and may become an influence in affecting market price, and that a market price at any given moment is an understanding of supply in

relation to demand on the basis of known trade information.

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"In this connection it is important to inquire where the market price is really determined; whether in that market center through which the bulk of the commodities passes or in that market center where the market news is concentrated? Specifically, is the world-price of wheat determined in Chicago, Minneapolis, Duluth, or in Liverpool; is the world price of cotton determined in New Orleans, New York, or Liverpool, or Manchester; is the world price of copper or steel determined in New York or abroad; is the world-price of wool determined in Boston or London; is the world-price of petroleum determined in the United States or abroad; is the price of coffee determined in Sao Paulo or in New York? In a sense these queries are academic in character, because a market price may be built up by adding transportation, handling and storage charges, or may be taken apart by deducting them. That is, the Liverpool price may be the Chicago price, plus charges, or the Chicago price may be the Liverpool price, less charges.

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DISCOUNTING THE FUTURE.

"Buying and selling future contracts is like crossing a bridge before one gets to it. There is a calculation of what will happen; it is a case where coming events cast their shadows before them. Future dealings are really the shock absorbers in business. In our modern roundabout business, speculation, that is, buying and selling future contracts, is absolutely necessary. When *this speculation is rendered as intelligent as possible through a study of trade information, the fluctuations in market prices are leveled out and the risks of business are minimized.* This is a most important service. It has often been observed that the actual transpiration of an event does not have the effects upon the sensitive exchanges that might have been expected from its significance. This is due to the fact that its effects have

been anticipated and discounted. The anticipation of effects is discounting the future. The stabilizing results, beneficial to producer, to middleman, to consumer, in the reduced risks of business, are due to market news.

TRADE INFORMATION AND COMPETITION.

"Competition in trade may be based upon the effort to secure better trade information or upon the effort to judge most accurately the effects of market news. The former kind is inevitable under private individualistic competition, where private enterprise is superior to public enterprise in securing the essential business facts. In some cases the government can maintain an organization of a magnitude that is impracticable for private enterprise. The German government had a system for securing information from all parts of the world, through foreign trade agents, foreign branch banks, government agents, missionaries, emigrants, steamship companies, beyond anything an individual firm could do. No British business firm could match the resources of the British Board of Trade. No American firm has the potential power of our consular and trade-commissioner service.

* * * * * *

USE AND ABUSE OF TRADE INFORMATION.

"There is, of course, a right use and a wrong use of market news. In all cases the news should be reliably true. Falsification, by exaggeration or by depreciation, can never be right. Organized exchanges have very strict rules in this regard, because they have learned by the bitter experience of public disapproval that honesty is the best policy. It is not defensible, either, to issue reports as fresh that have already been discounted in the market. The news coming through the 'ticker' service is condemned by the experts on the exchanges as 'gossip,' because the facts have already passed through the hands of those who have had every reason to use them for their own advantage.

"It is easy to start a rumor in an uncertain market, and unfounded reports have a remarkable tendency to grow fast. Any 'manipulation' of this sort is to be utterly condemned. Nothing can insure the right use of market news besides an unswerving honesty and integrity. The individual may be able to escape with the plunder derived from false reports, but the institution through which he works will sooner or later have to bear the responsibility. Stock markets testify to this fact, as do also commission merchants. The evil practice of one man may undo the good work of a score of other men. This statement is peculiarly true in the use of market news.

MARKET NEWS AS A BUSINESS FORCE.

"It must be realized clearly that market news is not in itself either a function or an institution; it is an active force, and active business force, subtle, intangible pervasive. It is a motive power of judgment. 'Carriers may be provided to transport the crops to market; local, central, and retail markets, elevators and warehouses, exchanges and other market places to facilitate their storage, preparation and sale; but without authentic current trade information the machinery of distribution could not but operate in a haphazard manner, and prices would seldom, if ever, be such as the actual or probable supply and demand naturally warrant.'

"Market news, while not a function in itself, performs a most essential commercial function. It is an organizing, directive force; it is an intelligent use of business facts for the purpose of business management. Under a regime of individual enterprises, men do what pays best, or what they think pays best. The determination of what pays best is based on the individual's interpretation of trade information as he knows it. This applies both to industry and to trade. More and more, commodities are being diverted *en route*, on telegraphic advice as to market conditions in certain trade centers; more and more, producers whether farmers, manufacturers, or mine operators are directing their operations by market news. Through the medium of

market news the economic process from beginning to end becomes more intelligent.

"An increasing factor in market news is the knowledge gained from scientific research. 'The chemical laboratory is now a necessary part of every steel plant, fertilizer factory and dye works. Manufacturers in every field, seeking to better the quality of their products or to reduce costs, have found the services of the chemical engineer indispensable. Old rule-of-thumb methods have been scrutinized in the light afforded by scientific experimentation, and great improvements have been made in fundamental processes, especially in the utilization of by-products that had been considered waste and discarded.'

"Market news is, therefore, not only an organizing and directive force, but also a conserving force."

In his very able work, Principles of Marketing, Fred E. Clark, Ph.D., Associate Professor of Economics and Marketing in the Northwestern University School of Commerce, discusses "Market News," at page 380, in part as follows:

"The significance of adequate market news and of the standardization of products in effective marketing has been suggested from time to time in previous chapters. This and the following chapter include a more thorough consideration of these points. The two subjects are closely related. Each is important in the establishment of market price and in increasing the ease with which the transfer of title can be accomplished. The full usefulness of neither, moreover, is possible without a proper development of the other.

IMPORTANCE OF MARKET NEWS.

"Market news is a pervasive element in marketing. It is the determining factor in establishing market price. If the collection, interpretation and circulation of market news could be so perfected as to make absolutely accurate provision possible, market risk would disappear. By minimizing risk, market news makes the problems involved in market finance less difficult of solution; loans can be given and credit extended on sales with greater certainty

of normal payments being made, and investment in stocks and in sales campaigns is likewise attended with less risk.

"It is assumed by the apologist for the competitive regime that the forces of demand and supply tend constantly toward an equilibrium. But as markets grow in size and complexity, as roundabout methods of production involving months and years of time are more extensively employed, and as the necessary investment in fixed plant increases in relative amount, conditions arise which make it necessary that information concerning demand and supply be carefully collected, interpreted, and dispersed, if this equilibrium is to be in any measure realized. It is the presence of these conditions in modern industry, together with the lack of sufficient market information, that is a frequent cause for individual failure on the part of business men, just as it is a common cause of alternating high and low prices for individual commodities.

PROBLEMS ARISING FROM INADEQUATE NEWS.

"An adequate market news service prevents much waste in marketing, waste which is of great importance to the common welfare as well as to those most directly concerned in individual transactions. The most obvious waste from inadequate market news is found in the market for perishable foods, more especially fruits and vegetables. These products are grown by numerous producers, frequently scattered over a large territory, and in widely separated producing areas. If too great a supply reaches a given market, prices will drop, and it may not even pay to market some of it. At best a low price will prevail, and the goods must be sold at this price or shipped on to other markets. This is impossible with the more highly perishable commodities, and great deterioration occurs with many others. The roundabout shipment and sale also cause additional costs to be incurred. And when prices are forced down in the one market, consumers depending on other markets where the surplus might have gone, may be forced to pay high prices because the supply there is small.

MARKET NEWS AND BUSINESS POLICIES.

"In all industries a knowledge, or a forecast, of future market conditions, as well as of day to day developments, is important. All production is for the future; and, consequently, producers establish production policies on their judgment of future markets; merchants determine purchase policies on their judgment of future markets; and traders on speculative exchanges, likewise, base their transactions on forecasts of the market. The more elastic the demand for a product the greater is the need for a proper estimate, for production must usually begin long before sales are possible, and large stocks must often be accumulated before the market forces are definitely in operation.

THE MARKET FORECAST.

"A proper forecast of the market for either the immediate or the distant future is dependent in the first instance upon a full knowledge of the pertinent conditions which bear on demand and supply, and on the timeliness with which these facts are ascertained. Then, with the data at hand, the accuracy of the forecast depends upon the skill with which they are interpreted.

"Both the volume of products which may reach the market and the intensity of demand become more and more uncertain as forecasts extend further and further into the future. The activities of other producers, changes in technique, weather conditions, general and special business conditions, the reaction of consumers to products and prices—these and many other conditions are variable. They are difficult to determine for the immediate future; and as the time for which they are to be forecasted increases, the difficulty of prediction grows greater.

"The speed with which the knowledge of conditions is disseminated to interested parties varies greatly. This is extremely important, for those who first possess knowledge of significant conditions thereby gain great advantages. It is on account of the importance of the time element that large busi-

ness concerns, especially those operating in speculative future markets, often have elaborate agencies for gathering market news, as, for example, leased telegraph wires with which to obtain and distribute the news quickly, and secretly. In contrast with these are the smaller operators, farmers, manufacturers, merchants, and the final consumer, most of whom are almost entirely dependent on outside, and often prejudiced, sources of information.

INTERPRETATION OF MARKET NEWS.

"The value of market news depends, finally, not only on the accuracy and completeness with which it is gathered and the speed with which it is disseminated, but also upon the skill with which it is interpreted. No matter how much information is available it is valueless until interpreted; and upon the skill with which he interprets the data at hand depends in large degree the business success of the trader and even of the producer. For from that interpretation business policies are determined and plans are formulated. Here, wide variations are found among business men. Many depend on rumors and 'hunches.' But some spend large sums in gathering news and putting it in form so that the executives can most readily and accurately interpret it. Successful speculation, in particular, depends upon prompt and accurate collection and interpretation of market news. But to all business timely news which is quickly and accurately interpreted is essential.

SOURCES OF MARKET NEWS.

"Our National Government offers what is by far the largest single source of market information in this country, through the annual and special reports of its many bureaus and departments. Yet another important source of information is the data compiled by business men in their own offices; from material obtained by governmental bodies and other agencies, from the records of the business, and from the experiences of their own staff. Furthermore, special investigations for the purpose of securing informa-

tion not otherwise available, are now made for business houses by their own staffs or by outside agencies. Somewhat similar to this is the information collected by trade associations from their members. Large banks, likewise, have departments for gathering and interpreting market news which will be of assistance to their officers and clients. Finally, there are private agencies, such as the market reporters of the agricultural markets, representatives of the public press, research departments of educational institutions, and private research and statistical agencies.

DISSEMINATION OF MARKET NEWS.

"The most familiar medium for the dissemination of market news is the public press. The advertising pages of magazines and newspapers are utilized entirely in giving such information, especially that concerning the supply of specific products and services. Newspapers and trade journals quote the prevailing prices for raw materials and foods—live stock, grain, wool, vegetables, and fruits—for many manufactured products, and for stocks and bonds. News articles give general information of market conditions, and of political, legal, social and economic considerations bearing thereon. In addition to the newspapers and magazines, some of which are known as 'business periodicals,' there are over 3,500 trade and agricultural papers in the United States, the chief purpose of which is to gather and circulate market news. The annual and special reports of produce exchanges, chambers of commerce, and trade associations also contain valuable market news.

"The mails, the telegraph, and telephone are also used extensively. The sources just mentioned are mainly dependent upon these for collecting and communicating the news which they interpret and circulate. By means of these the news bureaus and telegraph companies, private market reporting agencies, and private wire houses send out data on opening and closing prices on produce exchanges and on stock exchanges; and quotations are sent out daily by commission merchants and wholesale receivers to

the country shippers of grain and other produce. Goods are ordered by mail, telegraph, and telephone, and quotations are made by the same means. Private information from salesmen and agents is received through these mediums, and general market information is also sent over the wires and by mail.

"Finally, as important a source as any to many business men is market news conveyed by word of mouth—conversation with salesmen and buyers, advice secured from bankers and private research and statistical agencies, talks with business associates, friends, and acquaintances.

NEWS OF THE AGRICULTURAL MARKET.

"In view of its importance and the difficulties involved in its collection perhaps the most complete and accessible information is available concerning the domestic agricultural market. Especially valuable is the work of the Bureau of Markets and Crop Estimates of the United States Department of Agriculture and of the Bureau of the Census of the Department of Commerce.

"The purpose of the market reports of the Bureau of Markets and Crop Estimates is 'to cover the markets upon every farm commodity which constitutes an important part of the Nation's food and clothing supplies * * * for the express benefit of producers, distributors and consumers.' This service has to do principally with current market news—prevailing prices in different markets, amounts shipped from various producing areas to specific markets, current production and available stocks. The crop reports, on the other hand, are primarily important as a means of estimating future conditions of supply—acres planted and the condition of the crops at various times during the growing season.

* * * * * *

"The Bureau of Markets has in the United States 73 branch offices located at 46 large market centers, 16 of which are directly connected with the Washington office and with each other by some 4,500 miles of leased telegraph wires. Marketing experts keep in constant touch with market conditions in the field

and at consuming centers and at least 15,000 responsible individuals, firms, and railroads—voluntary reporters—render reports to the bureau regularly upon the marketing of farm products. Mimeographed reports are still sent to producers and the trade direct, but by the use of the telegraph and the press and latterly of the wireless these and the other reports sent out by the Bureau of Markets are received by not less than 15,000,000 potential readers.

"Other important sources of market information for agricultural products are the daily quotations sent out by telegraph of transactions on produce exchanges, the numerous market reporters and trade journals of local, sectional, and national circulation, the daily papers, the annual reports of produce exchanges, and the reports of the International Institute of Agriculture at Rome.

"NEWS OF MANUFACTURERS' MARKETS—*There are as yet no governmental bodies in the United States engaged in gathering market news of manufactured products on anything like the scale on which news of the agricultural market is collected.* The work of the Bureau of Foreign and Domestic Commerce in the field of foreign trade will be touched upon later. The Federal Trade Commission is making constant contributions, and more recently certain bureaus in the Department of Commerce have devoted considerable attention to domestic conditions in the market for manufactured commodities. A start has been made in the *Monthly Survey of Current Business* conducted by the Bureau of the Census, the Bureau of Foreign and Domestic Commerce, and the Bureau of Standards of this Department. The first number was issued in August, 1921. This gives summarized comparative figures of stocks, production and prices for important commodities, of foreign trade conditions, transportation, retail trade, banking and finance interest rates, earnings and employment, the cost of living and other subjects. The Decennial Census reports and the Census of Manufacturers, many of the publications of the Bureau of Standards, and the information contained in the *Monthly Review* of the Bureau of Labor Statistics of the Department of Labor, also contain valuable information.

* * * * * *

IMPORTANT SOURCES OF FOREIGN TRADE NEWS.

"The most important statistics of foreign trade are those gathered by the Bureau of Foreign and Domestic Commerce of the Department of Commerce, and published in the *Monthly Summary of Commerce and Finance,* in the *Weekly Commerce Reports,* and in special reports issued from the Bureau. * * * A complete report of the exports and imports of specific products is included in the annual report *Commerce and Navigation.* This Bureau also issues a weekly paper, *Weekly Commerce Reports,* covering conditions existing in various foreign countries and even giving specific market opportunities. Special pamphlets are published on market conditions in the sale of particular products and on trade conditions in particular parts of the world. Finally, confidential information of specific trade opportunities is given to accredited manufacturers.

"Much of the information which the Bureau of Foreign and Domestic Commerce publishes is received through reports from the members of the consular service, which is attached to the Department of State. There are some 300 United States consular offices throughout the world, one of the main functions of which is to keep in touch with commercial opportunities and business conditions, and to collect information that will be helpful to American business men. The results of their efforts are made available largely through the Bureau.

"Some of the large banks and such institutions as the Philadelphia Commercial Museum also gather news of general and specific foreign trade opportunities, and in some cases make special investigations for their clients. Information concerning foreign tariffs can be procured through such private agencies as those mentioned, as well as through the Bureau of Foreign Trade Advisers of the Department of State, the Tariff Commission, the Pan-American Union, and the Bureau of Foreign and Domestic Commerce.

NEWS OF GENERAL COMMODITIES.

"Valuable sources of information about prices of general commodities are the monthly and special reports of the Bureau of Labor Statistics of the Department of Labor. This information is published in the *Monthly Labor Review* and in special reports on wholesale and retail prices. The statistical tables which are included cover prices for the current year as well as for several years past. Unfortunately, these data are usually published some time after the facts are gathered, although such parts as have a news value for periodicals are given out in advance of the regular publication. The new *Survey of Current Business* issued by the Department of Commerce also bids fair to be of great value in circulating news of this kind.

GENERAL MARKET CONDITIONS.

"Finally, all business men are interested in what may be called general market news, that is, news which indicates the general conditions which prevail throughout the country, and the world—looked at not as a particular market, but as a great complexity of markets. There are certain general sources or 'indices' to which business men commonly look. These relate to the conditions that exist in such markets as the following: (1) general business—including building and real estate, iron production, bank clearings, business failures, labor conditions, immigration, crop conditions; (2) financial conditions—including conditions in the money market, foreign trade, gold movements, commodity prices; (3) the investment market—including prices of securities, crop statistics, railroad earnings, and social conditions. Conditions in the steel market are also considered of particular importance in determining the general conditions of industry. Some of these markets are of particular interest to certain groups of business men, some to others. Thus, the first group of markets is believed to show the trend of the general business situation, the sec-

ond group applies to the money market, and the last group to the investment market. Some statistics, such as stock market prices, banking and building statistics, are used to forecast future conditions; whereas others, such as imports of merchandise, commodity prices, or business failures are better used to indicate the existing situation although future tendencies may also be indicated by them.

CONTROL OF MARKET NEWS.

"Since the activities of producers and traders, and even those of consumers, are guided by their knowledge of the market, it is important that news should be accurate and timely. Prices, otherwise, will not reflect true conditions, and great harm may result to the public, as well as to private traders and producers. The statement that the crops in a particular section are abnormally large or small will commonly have an immediate effect on prices. If the statement is false, prices will be out of line with actual conditions. This will cause unwarranted loss to some and gain to others. Here is a great opportunity for private individuals, by spreading false news, to reap large gains at the expense of others. It is consequently, important that the information which is dispersed shall be accurate. In 'future' markets where even rumor may cause changes in prices amounting to thousands, or even millions of dollars in the aggregate, it is particularly important that the dissemination of market news be carefully guarded. On the Chicago Board of Trade in order to safeguard the news a very strict control is exercised by the Market Reports Committee over all news issued by members of the Board, and by any others who receive their information through it, i. e., over all individuals and firms over whom it can exercise control. This includes the reports of private wire houses, the private reporting agencies, members' daily market letters and the reports of telegraph and news ticker companies. The market letters of members are not allowed to forecast the market or to give advice. Market rumors are forbidden.

"Large firms can usually afford the expense involved in gathering market news, and those who control a large part of the trade in any particular commodity have through their own records the means of determining market conditions with a fair degree of accuracy. But smaller firms have no such facilities. To meet their needs either associative activity or governmental action is necessary. In this country the former has been rapidly developing among dealers and producers of manufactured products and raw materials other than farm products. And thus far governmental activity has been more concerned with farm products. At present there is a movement toward governmental assistance in gathering news of the manufacturers' market. And in the farm market such large organizations as the California Fruit Growers Exchange and the new United States Grain Growers Incorporated collect information for themselves.

NEWS COLLECTED AND DISPERSED BY THE GOVERNMENT AND BY ASSOCIATIONS.

"News gathered by the government and by trade associations is not always so timely as that obtained by large individual firms, so that these are often in possession of essential facts some time before those who depend on the government, trade associations, or other outside agencies. On the other hand, the news gathered by governments and by trade associations is likely to be much more extensive and accurate. This is partly due to the greater resources which may be made available to cover the expense involved, and, sometimes to the greater spirit of co-operation which is likely to prevail among those with facts to contribute. Finally, the government, may, if the public welfare demands, insist on receiving pertinent news.

"*Wherever there are many small business men engaged in an industry it is essential that some neutral and impartial agency should gather and disperse market news. Private information when collected is commonly only for the limited use of those who gather it, and when published it may be colored by the point of view of the compiling firm. Apparently*

the great number of both producers and dealers wh are working on a relatively small scale can recei adequate market information only through son governmental agency or through cooperation on very large scale.

CONCLUSION.

"It may be said, finally, that if the market new were complete, accurate, correctly interpreted, an thoroughly disseminated, demand and supply, in th absence of unforeseen natural conditions or artificia restrictions—such as patents and monopolies, gov ernmental or private—would always balance; an business profits, as a reward for risk-bearing, woul be entirely absent. But these conditions are fa from realized; and, consequently, producers an dealers face the possibility of gain or loss, hig prices or low, according as they are fortunate or s keen as to possess articles for which the demand i great, or so unfortunate as to possess those fo which the demand is small. In the modern marke business success depends very largely on the abilit of the individual business man to forecast his mar ket properly."

The every day necessity of Market News was set forth by Chief Justice Waite in discussing the wide use of the telegraph in the case of *Pensacola Tel. Co.* v. *West. Union Tel. Co.*, 96 U. S. 1.

"A prudent merchant rarely enters upon an im portant transaction without using the telegraph freely to secure information." (Italics ours.)

II.

THE COLLECTION AND DISSEMINATION OF MARKET NEWS DOES NOT DETERMINE PRICES.

It is evident that market news does not fix prices. It only reveals to men the actual economic situation. It is their individual interpretations which they place upon

such information and their subsequent actions which cause prices to rise or fall. For example, courts have rendered decisions which greatly affected prices. But the prices were determined by the interpretations which men placed upon that news when it was made public. Recently a Department of the Government gave out a bulletin which was interpreted to mean that there was a shortage in the supply of sugar. The price of sugar began to rise, but it was not the market news which caused the rise, but the shortage which the bulletin was thought to reveal and the subsequent action of men in view of that supposed shortage. The telegraph wires in June, 1914, carried the news of the assassination of an Austrian Grand Duke, and at once the disastrous chain of events began to unroll and the world was speedily aflame with war. But neither the newspaper correspondent who sent out the dispatch nor the news association which hired him, nor the telegraph wire which carried the message could be called the cause of the war. It was the fact of the assassination which acted upon the minds of men and precipitated the world's tragedy.

As applied to markets, the matter is thus explained by Duncan in his work on "Marketing," already referred to, page 225:

> "The forces of supply and demand meet in the market and culminate in a market price. The value of a commodity is there expressed in terms of the medium of exchange, that is, in terms of money, * * *
>
> PRICE FACTORS AND INFLUENCES.
>
> "A comprehensive view may first be taken of the complex of factors and influences which enter into market prices. It is not possible to name them all, because they not only differ at different times, but some of them are too subtle and intangible to be isolated and defined. * * *

"The theorist goes far beyond these factors and influences. 'Back of these causes lie other causes multiplying endlessly as we proceed backward. But if we trace back all of these causes to their utmost limits, they will all resolve themselves into changes in the marginal desirability or undesirability of satisfactions and of efforts respectively, at different points of time, and in the marginal rate of impatience as between any one year and the next.'

"The following causes have also been enumerated in the order of their importanec in affecting commodity prices: '(1) Increase of gold supply, (2) exhaustion of natural resources, (3) rising standard of living, (4) withdrawal of population from agriculture, and growth of cities, (5) trusts and combinations, (6) tariffs, (7) labor unions, (8) growth of population and unscientific methods of farming, (9) extravagance in expenditure, (10) waste and fraud in distribution, (11) uneconomical marketing and housekeeping, (12) speculation, (13) immigration.'

"*But it is not to be understood that these or any other set of factors and influences enter consciously into the construction of every price, or indeed of any price. The practical fact to be remembered is that business is a going concern, that price making is a progressive affair, that no price in the market today is built from the foundation up, that today's price is yesterday's price modified only by some bit of market news. In the long-time period, every factor and influence will have full effect, but from day to day there is only a step at a time.*

"All economic forces are finally concentrated in market price. Here is found the composite opinion of the best business minds, which have transmuted market news into the dollars and cents of price. This is the higgling of the market; it is the meeting of the minds of buyer and seller; it is the economic consummation so devoutly to be wished."

Also page 230:

"From this brief survey of local prices, several important points may be illustrated. In the first place, commodities with a world market are acted

upon by world forces and local prices are often determined by deductions from the central-market price. This is an instance where the superiority of market news is revealed. Generally, the local producer has little or no conception of the bewilderingly intricate cross-currents of forces that make up the world price. * * * The lack of accurate information in general on the part of producers renders them more or less helpless in bargaining; the price is usually determined for them and not by them. The need for more complete analysis of costs is patent here.

PRIMARY AND TERMINAL MARKET PRICE.

"As goods pass from the local market to the primary and terminal market, they enter the wholesale market system. Here there is a high type of organization; trained mind meets trained mind; knowledge is pitted against knowledge. The great forces of demand and supply work here under the most intelligent direction. The wholesale prices are the standard in accordance with which practically all other prices, especially of agricultural commodities, are gauged. 'Wholesale prices are more susceptible to, and they more accurately conform to, the various elements affecting demand and supply than do either retail or farm prices.'

"It is practically impossible to ferret out all of the influences that are at work upon the wholesale market prices. There is no single price; for prices are composites; they are the result of complex action. *To escape a bewildering maze, it is necessary to keep in mind the fact that the price of today is really an inheritance of past years, that prices tend to persist unless there is tangible reason for change, that the true difficulty is to transmute an item of news into terms of price.* Some change in the field of production or in the field of consumption will spread by direct or by indirect influence through the entire system, becoming less and less as it spreads. For the wholesale market price is a system with no logical beginning or end.

"The aim of any one seeking to understand the wholesale price of any given commodity should be to isolate the controlling factors. The purchasing department of a large cereal manufacturing concern, in order to master the wholesale price factors in the primary market for grain, plotted those prices from 1869 onward, accounting as fully as possible for every fluctuation. With this analysis it became possible to work more intelligently toward foreseeing the trend of prices, for the price of the day has a relation to past prices and to future prices.

"The future price is a speculative price in the sense that many influences are uncertain, but even in such a price it is possible to ascertain constant factors. Some kind of a charge is always running against commodities until they are consumed. * * *

"It is clear that the performance of every function in the marketing process is a charge against each commodity. The more difficult and hazardous the function the higher the charge. Time and place values are greater for perishables than for coal or pig iron. Take an example of citrus fruit. The cost per dozen of marketing California oranges in eastern markets based on an assumed retail price of 40 cents per dozen shows that the grower receives 10.7 cents, picking and hauling to packing house cost 1 cent, the packing house cost is 2.9 cents, freight and refrigeration cost 8.2 cents, the grower's selling cost is 0.6 cent, and the jobber's margin is 3.3 cents.

* * * * * *

"The prices in wholesale markets tend more strongly to be leveled out to an adjustment between markets representing costs of transporting, than local prices. In a highly organized business, as that of wheat, markets are kept closely adjusted through arbitrage. In perishable products the diversion of cars in transit aids greatly in price adjustment. In spite of all efforts, however, prices do get out of joint. But prices may readily get out of joint, for prices constitute a system in the literal sense that they are so connected as to make a complex whole. To understand the workings of this system at any given time and the changes it undergoes from one

time to another, it is necessary to trace the interconnections among different parts of the system. These interconnections are numerous and varied in their character. The whole system of prices is not a miscellaneous aggregate of simple commodities, but an organized combination of groups of commodities. The prices of articles within this group have especially intimate relations with each other and the groups themselves cross each other in rather perplexing ways. * * *

PRICE QUOTATIONS.

"*Wholesale as well as retail prices are often quoted in the papers. It is important to know what these quotations mean and how they are arrived at. In the exchanges the quoting of prices is carefully regulated. At the opening of the exchange each morning there is a bit of flurry in buying and selling, a playing for advantage between the bulls and bears, for the first sale makes the 'opening' price for the day, and fluctuations up or down are calculated from it. There is a corresponding struggling just before the closing gong strikes. Between these two prices all variations are recorded, together with the amount bought or sold at the new price. All of these prices are reported and spread broadcast throughout the country. They represent, however, prices for the basic grades of commodities. In addition there may also be given in the market reports what is bid or at what figure the commodity is offered.*

"In the stock yards the day's prices are quoted for different grades of livestock, and the ranges in price are usually given. It may happen that no single transaction has taken place at the figures quoted, but within them the sales have taken place. These price ranges are secured by a special reporter who circulates from day to day among the commission men and stock buyers and makes inquiry. On the Butter and Egg Board the prices, bid and offered, are written on the blackboard, but the reported quotations are secured in much the same way as in the stock yards. In the produce market the representative of the official bulletin interviews, for instance, the 'dressers' and live poultry men regard-

ing prices for the day; and having formed his ow
judgment of the feeling at the time the session is o
he establishes the quotation for the day. The r
porters go about the street and find out the views
different merchants, and out of these 'talks' develo
the price quotations for the day."

In "Marketing," written by Paul D. Converse, He
of the Department of Commerce, University of Pitt
burgh, the following is set forth, page 206:

"The professional traders in forming their opi
ion as to the trend of prices consider all the know
factors affecting supply and demand. In the ca
of wheat they consider the conditions of the cro
in all producing countries, the acreage planted, th
amount carried over from last year, the visible su
ply, the probable amount still in the hands of th
growers, the export demand from all importing cou
tries, and the rate at which the domestic mills a
purchasing. They thus form their opinions as t
probable conditions in the future and buy and se
accordingly. As the crop conditions are affected b
the weather the prospects may change materially i
a short time. The report of rust in Saskatchewa
may cause a violent increase in price, while the new
of rain in Argentina may cause a drop in price
The news of an impending war may send prices u
as the armies will need wheat. Prices are also a
fected by the general industrial and financial situa
tion. Different traders attach different importanc
to the same report. One trader considers a certai
bit of news important while another trader ove
looks it entirely. One trader considers himself be
ter informed as to actual conditions than other
Hence a difference of opinion as to future prices an
hence future trading."

Prof. Clarks in his Principles of Marketing, alread
cited, states on page 422:

"Futhermore, market prices tend constantly t
change as a result of the variation in knowledge o
fundamental conditions possessed by traders, th

strength of consumers desire and the need of sellers to realize on their merchandise. At any one time, the estimates which traders make of conditions of demand and supply, present and future, determine the actual demand and supply which is effective in the market—whether they reflect the true potential conditions or not. The extent to which these estimates are correct over given periods determine how closely market prices will conform to costs, as well as the range of fluctuations in prices over shorter periods."

Also on page 426:

"The retailer, like the manufacturer, sets many prices by estimating the price which will bring the best returns. He may do this by comparison with similar goods in his own store and *with the prices charged by competitors.*"

It is evident that the market news does not determine the price. The price at a given time is the resultant of the action, it may be of thousands of men, and these men act not according to market news but according as they individually interpret market news. In the final analysis the price is determined by supply and demand, and these economic forces market news endeavors to reveal, in order that men may use their judgment and formulate each his individual action.

III.

MARKET NEWS IS ABSOLUTELY ESSENTIAL TO COMPETITION.

In the case of *U. S.* v. *Union Pacific R. R. Co.*, 226 U. S. 61, Mr. Justice Day thus defines competition:

"To compete is to strive for something which another is actively seeking and wishes to gain."

He then says:

"The Southern Pacific, through its agents, advertisements and literature, had undertaken to obtain

> transportation for its 'Sunset,' or southerly route across the continents, while the Union Pacific had endeavored in the same territory to have freight shipped by way of its own and connecting lines, thus securing for itself about 1,000 miles of the haul to the coast."

In order then for the Union Pacific to strive to secure the larger amount of this great volume of freight, its freight solicitors would first have to study carefully the character of the business, the rates charged by the other road, the service being rendered by it, the personal influence that was being exerted by the officials of the Southern Pacific and the advertising it was doing. It would also have to take into account ocean rates from New York to the coast as well. Suppose that the Union Pacific should fix its own rates based on what it believed was the cost of the service, furnished what its officials believed were reasonable accommodations to shippers, regardless of the rates charged by the Southern Pacific and regardless of the rates charged by ocean carriers, and suppose further that it paid no attention to the special facilities furnished by the Southern Pacific, would that be competition? It certainly would not. Can one railroad compete with another when it pays no attention to what its rival is doing? To assert that it can is a piece of dishonest nonsense. Counsel for the Government, in their brief, page 168, make the remarkable assertion referring to the time when the Sherman Anti-Trust Act was passed:

> *"Under those conditions but little attention was given to the price of competitors."*

In other words, at the time the Sherman Anti-Trust Act was passed in 1890, railroads fixed their rates for competitive points without any knowledge or inquiry as to the rates of other railroads at the competitive points,

there never had been any rate wars on the railroads of this country prior to 1890. Farmers were in the habit of selling their wheat without inquiring what their neighbors were receiving for wheat, or what the local elevators were paying or what was the price at Chicago or Liverpool. In those halcyon days, manufacturers of sugar sold their product at a cost plus basis, serenely unconscious of the price charged by rival refiners. In those days brokers sold stocks and bonds without asking what was the price on the stock exchange. The Standard Oil Company had never run down the price of oil to put some recalcitrant rival out of business.

The truth is that as far back as men have any knowledge of trade or commerce price has been one of the first considerations in competitive buying or selling. Prior to 1890, the whole fabric of railroad rates in this country was created after a number of costly rate wars, the closest attention being paid to the rates of rival roads at competitive points, as well as to water carriers in regions where they were factors in transportation. Corners or attempted corners on the Chicago Board of Trade had on various occasions started wheat or corn to market in a veritable flood.

As long ago as 1720, Daniel Defoe, in his "Tour of Great Britain," Vol I, Letter II, wrote a description of the great Sturbridge Fair and said: "There is scarce any price fixed for Hops in England, till they know how they sell at Sturbridge Fair." It is inconceivable that at the Fair, the growers of hops sold them without inquiry as to what others were receiving or asking for hops, what was the conditions of the crop, what was the probable consumption, and all the other factors which enter into supply and demand. The information would not be very accurate or very well collected but the principle would be the same.

In his book, "Marketing," Converse, the author, states page 549:

"The sales manager must consider the prices charged by his competitors."

As Clark states in Principles of Marketing, page 428

"Even when stores do not consciously follow a leader in this way—even when they themselves lead —they nevertheless follow prices in competing stores, and gather valuable information of their competitors from their own customers and from supply houses. Although a merchant has a definite way of determining the prices at which he will offer his merchandise for sale, such as cost plus a definite mark-up —he must usually consider the prices prevailing in competing stores and within the limits which his experience and judgment show to be necessary, price his own goods so that they will compete successfully. Each store ordinarily watches its competitors with great care. In this way it is able to learn what competitors are doing, and prepare to meet in some way any advantages which their prices, merchandise or service may have in the eyes of buyers, before the buyers themselves are aware of them. To the extent that this is true, it can be said that each merchant sets his prices to meet the prices of his competitors."

In his testimony for the Government, F. J. Hurtz, purchasing agent of Bradley & Vrooman Co., in speaking of fixing his own prices, was asked the following:

"Q. But you make use of the information you get (as to prices)?

A. Naturally.

Q. From your competitor's prices? (Rec. 57.)

A. Naturally.

The Court: Naturally" (Orig. Rec. 87; omitted from Transcript).

Solomon L. Sulzberger, president of the Enterprise Paint Manufacturing Co., testified for the Government.

He was asked:

"Q. How do you get quotations of oil, Mr. Sulzberger?

A. Why, where I can in the market, I usually call up one or two of the oil people" (Rec. 59).

"Q. Previous to last July do you recall whom you sought to get bids from?

A. I have called up Hirst and Begley. I have called up Goodrich, I have called up the American. In fact all of them" (Rec. 59).

Also:

"Q. Now, in selling your oil, Mr. Sulzberger, you aimed to follow as nearly as possible the crusher's price for that day as nearly as you could ascertain it?

A. Yes, sir.

* * * * * *

Q. Aimed to get the same price that they did?

A. Yes" (Rec. 63).

It would seem that counsel for the Government should have instructed Mr. Sulzberger, their own witness, that when the Sherman Anti Trust Act was passed, men were able to compete without paying any attention to the prices of their competitors, and that when he made inquiry as to the price others were asking for oil, he was doing something which that law was designed to prevent. But in his apparent ignorance, Mr. Sulzberger carried on his business as men have always done ever since business became an activity of mankind and in the manner they will carry on business as long as prices are determined by the play of competitive forces. If this is so, market news is essential to competition and the statement of counsel for the Government that "formerly little attention was given to the price of competitors" was wholly inaccurate.

IV.

MODERN BUSINESS CONDITIONS MAKE IT NECESSARY THAT MARKET NEWS BE SECURED IN THE MOST EFFICIENT, RELIABLE AND ECONOMICAL WAY—THAT IS TO SAY, BY CO-OPERATION.

1. The Development of Markets.

In former days a market was of a very limited area. It might be limited to a town or to some comparatively small area. But with the great development of transportation in the last 150 years, this has all been changed. Today the wheat from the Dakotas competes not only with the wheat from Kansas, but also with the wheat from India, Australia, and the Argentina. Percival White, in his book, "Market Analysis," published in 1921, makes this statement, page 1:

> "Originally, a market was the actual place where the exchange of one commodity for another took place. Since at that time there was no money, trading was done by a system of barter, by which the superfluous commodities of one man were exchanged for those of his neighbors.
>
> "Although markets have changed greatly in outward semblance since then, the fundamentals remain unaltered. A market is still nothing more or less than an opportunity to buy or sell. The great difference lies in the methods of locating the market, supplying it with commodities, and securing payment for them. Markets have ceased to be local assemblies or fairs held at some crossroads or other central location. A modern market is limited in scope only by the number of possible users of the product throughout the world. The introduction of money, improvements in transportation, the use of manufacturing and many other factors, have tended to specialize and complicate the original simplicity of the marketing function."

Also on page 222:

"The ever increasing volume of traffic greatly complicates the marketing problem. The railroad, the steamer and the automobile, all innovations, have revolutionized, and are still revolutionizing the distributive system to such an extent that possible markets for home manufactures have become international. The invention of the refrigerating system alone allows the whole country to have fresh oranges and bananas. The market for them has been enormously broadened. What is true of oranges and bananas applies equally to almost any other product. Increased facilities of transportation allow companies to invade markets, hitherto inaccessible."

Fred M. Taylor, Professor of Economics in the University of Michigan, in his book, "Principles of Economics," published in 1921, makes the following statement on page 247:

"Though a market usually has a location, the really essential element in it is rather a threefold set of relations: (1) Those among the sellers, (2) Those among the buyers, and (3) Those between the two groups over against each other. If men in Chicago, Detroit, and Duluth are freely competing with each other in selling wheat to the same general group of buyers, they belong to the same market, though located in widely separated cities. On the other hand, if two persons living in the same city and both selling coffee are after all dealing with different groups of buyers, they do not belong to the same market."

It is evident that markets are becoming broader all he time and as to some commodities such as cotton and heat they are practically world wide.

Now it is entirely obvious that where two competitors ere set down side by side in a fair or in a small town, ey had no trouble in keeping pretty well informed as the condition of the market. Each would know almost

exactly what goods the other had on hand, what he wa
asking as to price, and the amount of his sales. Of cour
his competitor would have equally large information wit
regard to him. Several small manufacturers supplyin
a local trade would at all times be well informed as t
the trade conditions in the local territory, prices aske
volume of sales, stocks on hand, etc. The farmer wh
would engage in trade by leading a cow to town to se
her at the local fair would be informed as to all the fa
tors involved in that market before he made a sale. Bu
when the small local merchant is in competition not onl
with his competitor across the street, but with Sear
Roebuck & Co., and Montgomery Ward & Co., both,
may be several thousand miles away, something else i
required. When the small manufacturer has expande
into the great industrial concern, seeking to meet com
petition in the markets of the world, something more i
needed than his personal observations or the reports of
few salesmen. When the farmer begins to ship carload
of cattle to Kansas City, Omaha or Chicago, he need
exact, comprehensive and reliable information with re
gard to every fact which may affect or enter into th
price of those cattle. Otherwise he will act in darkness

It would seem obvious that no individual, that no cor
poration could hope to enter the great markets of th
present and the tremendously greater markets of the fu
ture, without making ample provision for securing mar
ket news as to his product in the market which he expect
to enter.

2. The Development of Scientific Methods in Busi
ness.

But, aside from the vast development of the market
itself, modern business demands something much more

complete and exact as to market news than that which was satisfactory a few years, not to say a few decades ago.

Arch Wilkinson Shaw, Lecturer on Business Policy in Harvard University, in his book, "Some Problems in Market Distribution," says, on page 1:

> "Until recently business has developed largely on an empirical basis, though there is a general healthy feeling abroad that the business man should approach his problems in the scientific spirit and should have exact information to guide him in meeting and settling them. To that end, departments for the gathering, classification and interpreting of statistics have been organized by many concerns, physical laboratories have been established for research work, and tests of materials and special staffs of trained men are maintained to study every operation and process involved in the business and to find and apply the most efficient known way of performing each."

Percival White in his Market Analysis already quoted, states, page 2:

> "If we were in possession of all the data, it is safe to say that markets would be as measurable, as certain, and as determinable as any other phenomenon which obeys fixed laws. Markets are real, tangible, definite things. They may be plotted, and charted, and mapped and reckoned with just as accurately *as our knowledge of the facts will allow.*
>
> "We are inclined to look upon marketing problems today as we looked upon production problems ten years ago. Manufacturing in those days was more or less subservient to accident. It happened. Schedules, planning departments, routing and other outgrowths of modern production were as unknown then as is market analysis today.
>
> "It seems indisputable that the markets of the future are to be won only through the application of the same scientific methods which were so successful in the field of production.

• • • • • •

"The application of science to markets depends not upon guesswork, nor even upon a qualitative analysis of conditions, but rather upon a comprehensive understanding of industry in general, of the special line of business in particular, and of a quantitative analysis *of all the facts involved.*

* * * * * *

"Every science is built upon facts. Therefore, the first step in the application of science to markets is to reveal all the pertinent facts possible to obtain."

In Prof. Clark's able book heretofore cited, he makes this statement, page 381:

"But as markets grow in size and complexity, as roundabout methods of production involving months and years of time are more extensively employed and as the necessary investment in fixed plant increases in relative amount, conditions arise which make it necessary that information concerning demand and supply be carefully collected, interpreted and dispersed, if this equilibrium is to be in any measure realized."

There is no question but that every phase of business and especially of marketing is being put on a more scientific basis, and that it is necessary and highly desirable.

3. The Inadequacy of Governmental and Other Special Agencies.

As has already been pointed out, the Federal Government has developed, and is developing great agencies for the collection and dissemination of market news. This is particularly true of the great crops such as wheat, corn and cotton. It is of course obvious that the single planter of cotton cannot individually inform himself as to world conditions, nor could even large associations of planters, and yet the sale price of every pound of cotton is affected by conditions all over the world and by the

sale prices of cotton in every cotton market. Therefore, it is desirable that even the small planter of cotton be informed as completely as possible as to every factor affecting his market which is world wide.

The Government does this on a tremendous scale. More than that, the activity of the Government is supplemented by a number of private agencies such as newspapers, farm journals, brokerage houses and private agencies. In the case of the great agricultural products, it is necessary and desirable that the work of the Government should be supplemented by other agencies.

More than that, the Department of Commerce gets out a bulletin on business conditions, called Survey of Current Business, which is designed to give information as to business conditions in many varied lines. The object is to collect and disseminate facts with regard to many commodities, that is market news, and it is a field in which the Government is making great advancement, and properly so.

The facts are arranged so as to give comparisons with previous periods; and to facilitate comparisons between the various items, index numbers have been calculated showing the relation of any month to a base period, usually the monthly average for 1913. The major groupings of the "Business Indicators" are: production of basic commodities, stocks of goods on hand, prices at wholesale, retail and the farm, business finances, banking data, transportation and distribution measured by value of imports, exports, and domestic sales. Some statistics on labor, employment, immigration, wage movements, and the like are prepared. For some commodities, figures of consumption are given, and for some the volume of unfilled orders.

Much business reporting is also done by the Federa Reserve Board.

But the "Surveys" do not cover every field in detail With regard to manufactured products the Governmen does not maintain any agency which covers the field s elaborately as it does with regard to agriculture, an even so business cannot wait on the Government. Th Government can and properly should aid business men but it cannot properly take over their functions. Me trade every day, in fact every hour of the day and the cannot trade on the basis of a Government bulletin an more than a planter would be expected to sell his cotto crop without any knowledge of the present market quo tation on cotton at New Orleans, New York and Liver pool.

Almost any product which is sold in a country wid market in which there is great activity is beyond th reach of any individual or corporation of less than dominating size in the industry to adequately collect new as to trade conditions. Of course, the individual can d something. Of course a man can collect news from hi neighbors, from casual inquiry as to the world happen ings or as to matters of local importance, but men nowa days want to know what is happening in the world a fast as the telegraph, the cables and the wireless ca carry it. Today, we want our newspapers issued i hourly editions. But business men have just as grea need of market news as accurate as it can be secured an forwarded instantaneously.

It is as reasonable to argue that a man should be lim ited to his own efforts in the gaining of market news a it is to argue that he should not have the great press agencies and the newspapers to keep him informed as t the general news of the world.

But, more than that, the great agencies for the collection and dissemination of market news with the exception of the Government are private agencies. The news which they collect is property which the courts will protect. So that men have to depend on their own efforts to a very large extent for adequate trade information.

4. A Great Deal of Market News Can be Collected and Disseminated Only Co-operatively.

The great news agencies notably the Associated Press are co-operative news gathering associations. A number of newspapers will pool their news gathering resources for the benefit of all. Some of the newspapers are competitors or their field of operations will overlap, but to adequately collect the news is too great a task for any one of them. The newspapers of Chicago maintain a local news association called the City Press Association.

This association collects a great deal of news, sending it to the various papers members of the association. It is not because they have ceased to compete, but because they have learned that much of the news can best be gathered through the combined endeavors of all.

The same principle runs through all business.

In former days, when business enterprises were more individualistic in character, much trade information was secured by espionage. William H. S. Stevens, Professor of Business Management in the Tulane University of Louisiana, in his book, "Unfair Competition," devotes a whole chapter to this subject. The Government prosecutions against the National Cash Register Co., the United States Shoe Machinery Company, and others brought out many charges of this kind. But such methods are today

out of date, and doubtless come within the prohibitions of the Federal Trade Commission Act.

The best example of a co-operative enterprise in this regard is afforded by a stock exchange. Here all trading is in the open and the volume of sales and the prices are immediately known to all the members. It is clear that if a business concern desires to know promptly what its competitors are asking for their product, and especially as to changes in prices asked the trade as well as stocks of goods on hand, it can secure such information only from the competitors themselves. Of course it can get the information itself after a fashion. If it is a department store, it may send buyers around to the stores of its competitors to price or purchase various articles and get a line on the stocks carried. Or it may bribe employees of its competitors to secretly furnish it with information. But the first method is roundabout and unsatisfactory. It lacks immediateness and accuracy, while the bribing of the employees of competitors is no longer regarded as legitimate competition. It has been condemned as "commercial bribery." This has resulted in a great development of co-operation in collecting and distributing trade information.

Percival White, in his Market Analysis, already cited, page 177, says:

> "Companies have begun to realize that their own ideas are not sufficient, however valuable they may be. They also realize that if they are to obtain the benefit of their competitors ideas, they must give their own in return.
>
> "This tendency among competitors to co-operate is indicated by the growth of the various trade associations, such as the National Automobile Chamber of Commerce, the National Canners Association, the Hardware Dealers Association, etc. In following out this trend, business is only imitating the example of the medical profession and the sciences, which have

long realized the value of exchanging information. This growing feeling of friendliness among competitors is fostered by the various trade papers.

* * * * * *

"Bankers and brokers, for instance, are usually willing to give each other information concerning various securities. In this way, a man is able to get information which would be exceedingly difficult and expensive for him to obtain by any other method."

Market news for the most part is today gathered by some form of co-operation. When a newspaper sends a financial reporter to inquire as to prices of various dealers in some line, he has to obtain their co-operation. The great organization maintained by the Government for the gathering of trade information as to wheat, corn or cotton is nothing more nor less than a great co-operative enterprise. The cotton growers report to the Government from time to time as to acreage, condition of crop, cotton held over, etc. The Government then acts as a clearing house for this information.

The principle is the same when applied to some smaller organization. Modern business conditions make it imperative that business men have more complete, more accurate and more immediate trade information of every kind. It is evident that if this is to be secured, some rational method of co-operation must be developed, and operated. Rather it has been developed and is being operated either by the Government itself through some of its agencies, such as the Department of Commerce, the Federal Trade Commission, or the Federal Reserve Board, or else through private agencies securing the co-operation of those engaged in the business or industry itself.

V.

THERE IS NO DIFFERENCE IN THE CHARACTER OF THE ECONOMIC RESULT WHEN MARKET NEWS IS COLLECTED AND DISSEMINATED CO-OPERATIVELY OR PRIVATELY THAN WHEN IT IS COLLECTED AND CLEARED THROUGH A GOVERNMENT BUREAU.

It would seem evident that the collection and dissemination of market news tends to bring about certain definite results:

(1) As has already been pointed out, it tends immediately to broaden the market. When the farmer learns that the local price for wheat, as paid by the grain elevator is out of line with the price in Chicago, he will at once ship to Chicago. When the price in Chicago lags behind that in Liverpool men will at once buy wheat in Chicago and sell in Liverpool. As a matter of fact without a high development of market news, all of our markets would be purely local.

(2) Market news reveals the forces of supply and demand. It reveals the quantity of a product which is on hand, the probable demand, the price at which it is being sold, the bids that are being made for it, and the probable rate of consumption.

(3) Market news tends to bring prices more quickly into conformity with supply and demand, and thus to prevent wide variations in price at a given time. This is explained by Prof. Taylor in his "Principles of Economics" already cited, at page 278:

> "From the facts of demand and supply presented in the last chapter, the student might naturally expect to find *the same commodity selling for several different prices.* The appearance of a particular portion of demand, we learned, is conditioned on the establishment of one particular price, the appearance

of another portion on the establishment of another price, and so on; and an exactly similar statement is true for supply. At almost any price then, buyers could find someone ready to sell, and sellers could find someone ready to buy. Even if the forces we are about to study seemed likely to set up a certain price, say 55 cents in our silver problem, why is it not reasonable to expect that sales would after all be made at both higher and lower prices?

"Under some circumstances, this would undoubtedly prove to be the case. If several buyers with different notions as to what they wish to pay, go to as many different sellers, and, without inquiring of more than one seller make their purchases, some will certainly pay more and some less for the same commodity. The reason is that each buyer is unaware of the offerings of sellers other than the one he has visited. Similarly, if various sellers are dealing each with an isolated customer, some will get larger prices and some will accept smaller, because each is unaware of what other customers might be willing to pay. Even in the same trading room, it sometimes happens that the noise, crowding, and excitement so operate as practically to separate the sellers and buyers into different groups, making sellers in one part of the room unaware of what sellers in another part will take. Here also, therefore, some buyers will pay more than they would really need to if they looked about them a little, and some sellers will accept less.

"But the cause of these variations is plainly something abnormal. The market described is not even approximately the perfect market which our study postulates. Full competition between the different sellers on the one side, and the different buyers on the other is not realized. Some of the sellers do not have a chance to provide every buyer with an opportunity to purchase from them. Some of the buyers do not have a chance to provide every seller with an opportunity to make a sale to them. If all sellers and all buyers did so provide, the result would be very different. No buyer would pay more than any other, because other sellers, desiring to get his custom, would underbid the seller about to receive the exceptionally high price,—would, so to speak, *force the*

buyer to take their wares at the lower price. Neithe would any seller accept less than any other, becaus buyers other than the one about to get the commod ity at the lower price would promptly overbid tha one,—would so to speak, *force the seller to take higher price.* In a market which is truly single an theoretically perfect, therefore, any commodity a any one time must be selling at a single price.

"In the real world, of course, there are no theo retically perfect markets. The great exchanges fo wheat, cotton and steel where many buyers and sell ers actually meet in the same room and where almos every conceivable means is available for informin one's self of the facts, doubtless at times approac perfection; but ignorance, folly and the failure o competition always prevent the condition from bein reached; and in ordinary markets, naturally, this i much more emphatically true. Nevertheless, the ten dency toward a single price, set up by the force mentioned above is always sufficiently strong to be o real and practical significance. Even in the retail trade, differences between the prices of the same commodity in the same market or in connected mar kets are at once recognized as abnormal. The small est differences are remarked upon; anything like an indefinite enlargement is quite impossible; and with the spread of greater knowledge, alertness, and skill among buyers and sellers they must tend rapidly to diminish and disappear.

"Summarizing the above discussion, we have the following principle:

"Principle—The Law of Single Price.

"Within the limits of a truly single and theoreti cally perfect market, no commodity can have more than one price at the same time; and even within the limits of imperfect markets or groups of connect ing markets, any commodity must tend to have a single price,—allowance being made in the latter case for the expense of shifting from one to another of the connecting markets."

(4) Market news enables men to more quickly meet competition. A man knows the prices his competitors are making to the trade. He can cut under them, charge the

same price or do anything else he may please, to enable him to get the business. If he did not know their prices, he could not do this. He would then be acting in the dark.

(5) Market news enables men to better observe market conditions and so to an extent at least forecast conditions.

Lionel D. Edie, Associate Professor of Political Science at Colgate University, in his article on the "Coordination of Production and Marketing," published as a part of the book called "The Stabilization of Business," written by a number of prominent economists, and published in 1923, says at page 221:

> "The purpose of such economic data is business planning. The science of statistics furnishes the material for prediction and forecast. Prediction in itself is no new thing in the business world. But prediction that gets beyond loose guesswork and general 'hunch,' is decidedly new, and it is this new kind of guesswork, based upon more adequate and better analyzed data, which follows from the modern business method."

There is no field in business in which more is being done at the present time than in this one. The ever recurring periods of great business expansion followed by periods of great depression with the enormous losses which they entail are being studied not only by economists, but by business men as well. If a business enterprise is to avoid the shoals of bankruptcy, its managers are going to have something more scientific than the rule of thumb methods of the past.

For this reason, individuals, associations, newspapers, trade journals, private agencies, banks, chambers of commerce, The Census Bureau, the Department of Commerce, the Department of Agriculture, the Federal Re-

serve Board, the Federal Reserve Banks and the Federal Trade Commission, are all engaged in collecting and distributing knowledge and data, as to everything which may possibly affect trade or commerce in every known commodity.

These facts do affect prices. There can be no gainsaying of that fact.

On September 1, 1921, the Department of Agriculture issued its monthly report showing that the cotton crop would probably be 49.3 per cent of normal, with an estimated production of but 7,037,000 bales, the smallest production in 30 years. On the New Orleans Cotton Exchange, the price of cotton went up $6 a bale inside of ten minutes, after the report became public.

On September 8, 1921, news came over the cables that cotton had fallen in price on the Liverpool market, and immediately the price fell on the New York and New Orleans exchanges. This news was of course reflected in the price of cotton in the remotest hamlet in the south.

On September 11, 1921, news of a great storm in Texas which was thought to affect the Texas crop helped to start a rise in the price of cotton. This news was doubtless collected by newspapers. Also on September 11, 1921, returns from the British Board of Trade showed exports of yarns during August of 15,200,000 lbs. against 12,900,000 lbs. during August, 1920. This news tending to show a greater demand helped to bring about higher prices.

In all of these cases, and they are typical, it was the character of the news itself and not the agency which collected and disseminated it which affected the price of cotton. There was no virtue in the news of a shortage because it was collected by the Department of Agriculture, which would have become a vice if it had been col-

lected by a cotton broker or by an association of cotton planters. The newspapers did not cause the storm in Texas, nor was the British Board of Trade responsible for the increased export of yarns which its report showed.

If all of these facts had been collected by some man or group of men and if instead of giving them out they had held them, as they would have had a right to do, the ultimate effect would have been the same. Sooner or later the price of cotton would come into proper economic relationship to the supply and demand. That result could not be avoided. The more completely the facts are collected and the more widely and the more quickly they are distributed, the sooner will the price of the commodity reach its proper economic level, whether that price be high or whether it be low.

The fact then, that market news is collected by some individual or by a group of individuals, and is used by them, and not made public means nothing. In so far as they have collected and disseminated market news to that extent have they hastened the process of economic adjustment. Their failure to immediately make their information public does not retard the process of economic adjustment. They simply to that extent fail to hasten it. The ultimate economic result is no different. It simply does not come about as soon. There is no different result in the ultimate. Sooner or later the news becomes public and the adjustment follows.

But men have a right in this country to the knowledge which they secure whether it be of markets, law, political news or of anything else.

Meyer Rothschild learned the result of the battle of Waterloo and at great danger reached London before the official reports. He did not affect the result of that battle, but he had a right to use that market news for his

own trading as he did, just as he would have had the right to the first publication if he had been running a newspaper. In a short time, the news became public and the market adjusted itself to men's views of the result of the great battle. Rothschild did not retard the result. In so far as he acted he hastened it.

We have not yet arrived at a place in this country where men are to be condemned for failing to wait on Government agencies. There is still a place left for individual enterprise and initiative.

VI.

THE ARMSTRONG BUREAU WAS ESSENTIALLY AN AGENCY FOR THE COLLECTION AND DISSEMINATION OF MARKET NEWS.

It appears from the record in this case that there was no general agency for the collection and dissemination of market news with regard to linseed oil when Julian Armstrong, in October 1918, organized the Linseed Oil Council, as a member of the Armstrong Bureau.

It was a privately owned enterprise, organized and operated by Mr. Armstrong. He collected and sent out the information and maintained the offices. In this regard it did not differ from other news collecting agencies such as trade papers and a large number of market news agencies.

It is evident, from the record, that there was an economic need for such an agency. While there is an open market for flaxseed, there is no such market for linseed oil or other products manufactured from flaxseed. In order for a man to get a line on the price of linseed oil it was necessary for him to "shop around."

Solomon L. Sulzberger, testifying on behalf of the Government stated:

"When I am in the market (for oil), I usually call up one or two of the oil people for quotations." (Rec. 111; Trans. 59).

The inadequacy of this method is shown by Mr. Sulzberger's further testimony:

"I have called up the representatives of Kellogg, of Goodrich, or of the Midland, but I have not done so recently, not since last July. The reason is because I am not sorry to say, I bought my oil last August and I have not had any occasion except as a matter of curiosity to call anybody up on oil."

Certainly, Mr. Sulzberger's information was in all probability rather inadequate. Here was the situation: There were a number of crushers of linseed oil located in New York, Buffalo, Cleveland, Toledo, Chicago, Milwaukee, Minneapolis, Red Wing and Des Moines. They were engaged in selling linseed oil all over the country. Now, it is evident that if they were at all times to have complete accurate and adequate information as to the country wide market for linseed oil, they were going to have to secure it from some place other than the daily newspapers, and the Government publications.

Mr. Quine, testifying on behalf of the American Linseed Oil Co., one of the largest companies, stated that the information sent out by the Bureau only enabled him as sales manager to check up on the reports of his own men as to prices, etc. But he stated that this made his information more accurate and gave him a line on what his competitors were doing in the territory (Rec. 207-208; Trans. 119).

But of course, the smaller concerns would not have the facilities of the larger concerns in this regard. While the price of linseed oil as offered by the various crushers did not change as rapidly as that of some commodities, yet the manufacturers were greatly in need not only of

price information, but also information as to the quantity on hand and the sections of the country from which there was the greatest demand. If there is need of market news in any business, there was a need in the linseed oil business.

The facts which the Armstrong Bureau collected and disseminated constituted market news. The individual subscriber, when he had quoted a price on linseed oil to the trade at once reported such fact to the Bureau. In turn, this fact was immediately reported by the Bureau to the other subscribers.

In his book "Marketing," already quoted, Duncan states page 206:

> "Whatever has any effect upon the market price is trade information. This means that any event which changes in any respect the supply of or demand for any commodity is market news. * * * Knowledge of facts, then, that can be judged on a price basis is market information."

In this regard, the most important fact is what are men asking for or offering for a given commodity at a given time and place. There are numerous stocks on the New York Stock Exchange which are not traded in every day. But every day the financial page of the newspaper carries a list of these stocks with the price "bid," and the price "asked." As to active stocks there are reported not only the actual sales, including prices and number of shares sold, that is to say the actual transactions, but the price "bid" and the price "asked" at the closing of the exchange. A storekeeper has a box of strawberries in his window marked "35 cents," indicating that he is offering strawberries at that price. All of this is of course legitimate market news. Every week a prominent Chicago brokerage house sends out a list of bank stocks and local bonds giving the "bid" price and the "asked" price.

Now when the American Linseed Oil Co. for example, quoted to a prospective customer at Columbus, Ohio, linseed oil in carload lots at $1.53, a gallon, that was a piece of market news of interest to buyers or prospective buyers, and of vital importance to every one of its competitors. There is no need of saying that it looked toward the future. It was a fact definite and immediate when the Hirst & Begley Linseed Co. would send out instructions to their salesmen that they were to offer linseed oil for a certain delivery at $1.65 a gallon in carload lots; that also was a fact belonging to the day the instruction was sent out.

When a crusher sent in to the Bureau information to the effect that it had already quoted linseed oil to the trade at a certain price or that it had instructed its salesmen to offer linseed oil to the trade at a certain price, it was sending news of facts already accomplished just as much as if it had notified the Bureau of a sale already made. The important element is that it was market news which sooner or later its competitors would find out and which they all needed to know as soon as the offer was made or the instruction given.

As to the record of sales of oil and other products of flaxseed, including prices and statistics as to stocks on hand, of course no one would presume to claim that they were not vital elements of market news.

Furthermore, the fact that the Armstrong Bureau collected a large portion of the facts from its subscribers did not change the essential character of the enterprise. In the first place, the subscribers were the only ones who had the complete information. No one else would know the stocks on hand; no one else would have the complete information as to the prices offered to the trade. If the information was to be collected by the Department of

Commerce, it would have to obtain it from the s
source. In other words, the facts and statistics, th
to say the market news, with regard to the linseed
industry in the nature of things must be secured f
the linseed oil industry itself, just the same as infor
tion with regard to the acreage planted to cotton is
lected by the Bureau of Crop Estimates from the co
planters themselves.

It would seem apparent then, that the Armstr
Bureau was functioning as an agency for the collec
of dissemination of market news with regard to the
seed oil industry.

VII.

**THE METHODS USED BY THE ARMSTRONG BUREAU WERE SIM
THOSE WHICH WERE NECESSARY IF IT WAS TO EFFICIEN
COLLECT AND DISSEMINATE MARKET NEWS OF THE
SEED OIL INDUSTRY.**

1. Source of the Bureau's Information.

As has already been discussed, the Armstrong Bur
collected its facts from its subscribers, that is from
industry itself. That was the only source from wh
the information could be obtained. If Julian Armstr
had been operating a trade paper, and publishing
facts about the linseed oil industry, he would have
to go to the crushers of flaxseed to get the informati
just as newspaper reporters go to the produce mar
to get the current prices on food stuffs, and the Iron A
does in the Steel Industries, and just as the Stock
change gets the quotations on stocks from its memb
who are buying and selling stocks or bidding for them
offering them for sale, and just as the Census Bur
and other departments of the Government go direc

to the various industries for the information which they collect and publish.

2. The Contract and Its Penalties.

Counsel for the Government have made a great deal of the form of contract used by Mr. Armstrong in making his agreement with the subscribers, and in their Brief the contract is paraded forth in large type as something having a very sinister character. But it is to be noted in the first place that Mr. Armstrong was building up a substantial enterprise, that he would need offices, clerical help, etc., and in order to have any assurance that he would be able to go through with the enterprise, it was necessary that he have his subscribers bound on their part by a definite contract. He was obligating himself to do certain things. It was therefore reasonable and proper that the subscribers would also be under a definite obligation. That was the reason for his taking a bond. Unless the subscribers were to do their part, he would be unable to render the services he was agreeing to render therefore he was reasonably entitled to a bond from each subscriber that the agreement should be kept.

Aside from binding the members to any action regarding expenses and management, the members were obliged to do nothing except that which was perfectly lawful. Having agreed to do so they were obliged to send to the Bureau all their reports as outlined. To do less would have been unlawful. To purport to send all their reports to the Bureau and send only partial or selected reports, would have at once subjected the Bureau to the charge of being a price boosting arrangement. This plan called for all reports, the lowest as well as other prices, and the contract was so worded, and much of the work of the Bureau was so directed as to ascertain

whether any reports through inadvertence, neglect
otherwise were not sent to the Bureau. There is not
ing unlawful in assuming an obligation to perform
lawful agreement, and which if not performed would
unlawful.

The penalty provision of the contract was simply
compel the members to file all reports, and not merel
selected ones, which if not done would have been unla
ful.

3. MEETINGS.

From October, 1918, to June, 1920, the Bureau held
all twenty meetings. The most that can be said with r
spect to the meetings is, that they afforded opportunitie
for the members of the Linseed Council to arrive at som
sort of an understanding, express or implied, in restrai
of trade and commerce. It is not contended by the go
ernment that there was at any time an expressed agre
ment. There is no evidence of such, and that is not th
theory of the Government in this case.

The only contention of the government is that thes
opportunities for reaching an *implied* understanding, a
forded by the meetings, considered with the discussion
at the meetings, and the collection and distribution
statistical information, does prove an unlawful arrang
ment.

In this connection, the decision of the District Judg
Honorable George A. Carpenter, very pertinently an
soundly contains the following:

> "The prosecution, down deep, evidently believe
> that an association of producers or merchants mu
> necessarily be obnoxious to the Sherman Act becaus
> it affords an opportunity for the members to conspir
> to restrain trade.

"Where there is such an association it is perfectly natural for members to express themselves as to conditions and prices; in fact that is what the association is formed for, and these expressions have been seized upon by counsel as evidence to show that a corrupt agreement was actually made.

"To my mind some of these expressions are evidence that no such agreement was in fact made, if they are evidence of anything. It would be perfectly natural, among a meeting of oil men, for someone to say that he thought prices ought to be higher. The meaning conveyed by such an expression would be that the man was at a loss to understand why prices were not higher, taking into consideration the demand and supply and conditions of the trade. I might well say that the weather ought to be cooler without laying myself open to the imputation that the temperature had been fixed by an agreement of mine.

"*Logic which assumed that because there is an opportunity to fix prices, therefore prices are fixed, is contrary to the genius and theory of our law.* Every man is presumed to be innocent until he is proved to be guilty. If the Armstrong Bureau is to be dissolved merely because it afforded an opportunity for the members to fix prices, then this court, with equal propriety, could be asked to dissolve any lunch club where business men meet. This theory hardly warrants discussion, and I would not mention it had I not been gravely urged in this case, that such was the underlying thought of the prosecution. It is the ancient fallax—*post hoc propter hoc*" (Rec. 47, 48). (Italics ours.)

The language of the contract relating to the meetings is general in scope, qualified to the extent, however, that any subject noted for discussion must in the discretion of the Bureau be in accord with the letter and spirit of the agreement for the rendering of the prescribed service. Obviously it would be impossible to define in advance specific subjects which might properly come up for discussion, consequently phrases of the most general and harmless character were used. "Within the letter and spirit

of the agreement," necessarily, under all rules of construction, must take into consideration the specific purposes as set forth in the beginning of the contract, and found on pages five to seven of the government's brief which constitute limitations upon what subjects might be discussed at the meetings, and limit the general language just mentioned.

So then, as far as the purpose of the contract is concerned, it is wholly unfair to merely PRESUME, from the use of general language permitting discussions of matters affecting the industry, without bearing in mind the specifically enumerated purposes, that such discussions are for the sole purpose of bringing about illegal understandings. The defendants are entitled to the absolute contrary presumption which must stand until overthrown by evidence of the most clear and convincing character.

The minutes of these meetings and the testimony of the various witnesses show that nothing was said or done from which an illegal arrangement could reasonably be inferred.

Mr. Mann of Mann Brothers, Buffalo, New York, manufacturers of linseed oil, testified:

> "I never attended meetings of the crushers at the Armstrong Bureau. * * * My son consults with me with reference to prices, and our prices were never at any time controlled or directed by anything other than my own judgment as to what they should be. I never attended any meeting with any of these crushers outside of the Armstrong Bureau. * * * While my firm was connected with the Armstrong Bureau I never discussed the question of prices with my competitors or with the Bureau and never in any way wrote to my competitors in reference to prices" (Rec. 71).

Mr. Samuel Mairs of Archer-Daniels Linseed Company said:

> "I attended two meetings of the Armstrong Bureau. There was not to my knowledge, any discussion at those meetings, formally or informally, as to what prices of any of the crushers would be or as to what prices they should make or would make in the future. None of the members of the Armstrong Bureau ever criticized me in any way for any price I had ever made, or tried to embarrass me or impose any penalty upon me for making any price I saw fit at any time or in any zone" (Rec. 77).

Mr. Ferry testified fully on pages 85-87 of the record as to the character of the meetings and said among other things "There has never been a discussion as to what prices were to be charged by any of the crushers."

Mr. Goodrich of the William O. Goodrich Company, Milwaukee, Wisconsin, said:

> "Q. Did anyone ever criticize you for making any kind of a price at any time, that is any of these crushers or the Bureau? A. In the nature of a reprimand, you mean? Q. Yes. A. No, sir. * * * I attended all but one or two of the meetings of the Bureau. There were no discussions at the meetings as to prices that we would charge for our product at any time. We followed the line of procedure that has been outlined here before—the roll call and the round table, and the discussion of the docket that had been forwarded. The discussions were on subjects personal to the industry and were very general" Rec. 97).

Mr. George A. Martin of the Sherwin-Williams Company, among the largest buyers of linseed oil in the country, said:

> "I only attended six or eight of the meetings of the Linseed Oil Council at the Armstrong Bureau. There was no discussion at any of these meetings as to prices which were to be charged by any of the

crushers, and there were no understandings or int
mations of any kind as to prices which anyone shoul
thereafter charge" (Rec. 105).

Mr. F. Carlton Smith, Minnesota Linseed Oil Co. (Re
109):

"I never gave any assurance to any of the othe
crushers as to the maintenance of a price or the re
tarding of the lowering of any price. We never i
any way discussed prices with our competitors. * *
None of the other crushers ever in any way criticize
me for any price I had made at any time. We woul
not submit to it for one thing."

Mr. Leffingwell of the Northern Linseed Oil Company
on pages 110 and 111 of the record, said:

"There was no time that I felt obliged to maintai
any price for any particular time. I never gave an
assurances to anyone that I would not reduce a price
I attended all the meetings of the Linseed Oil Coun
cil under the Armstrong Bureau, and there was neve
at any time any discussion there as to the prices tha
the crushers were to charge for their product. Th
minutes of the meetings, I think, set forth the natur
and the substance of the deliberations. I never, di
rectly or indirectly, gave any assurance to any o
the other crushers as to any price or as to any chang
in prices that I would make at any time, and the
never gave me any assurances as to any prices whic
they would make or any changes of prices which the
would make. We never talked about prices at all."

To the same effect as the foregoing see Record, pp. 125
126, 136 and 147.

Counsel have *assumed* that the "friendly companion
ships prevalent in these meetings" resulted in a crim
inal conspiracy, and even state that no comment is neces
sary. Social or any kind of contact among business men
will result in their becoming more friendly disposed
toward each other than they otherwise might have been.
If one competitor is told that another competitor has

done a certain thing, even though the report be false, the most bitter ill feeling would be engendered. Such a report might fall in the category of slander of title, or regarding an alleged cut in price to a certain customer in a specific locality, for the sole purpose of injuring a competitor, all with the result of each competitor resorting to purely bludgeon tactics, entirely foreign to any sane methods of competition. For one business man to ask another if he made a certain statement, or if he has made a certain price, for the purpose of learning the truth, does not imply nor justify any inference that the person asking the question has surrendered his freedom of will and judgment, nor that he is endeavoring to ascertain the true facts for the purpose of checking a collateral agreement in restraint of trade. It is reconcilable with an innocent purpose and intent. Social contact does not even tend to prevent or induce a competitor from cutting or raising a price, when he considers economic facts warrant his doing so.

Is it unlawful to clear up such misunderstandings? Enlightenment as to conditions affecting the industry make for efficiency in production and distribution, equilibrium of supply and demand. Knowledge of all facts obtained in an accurate manner, does not mean prostitution of individual judgment for criminal purposes, and abandonment of freedom of action regarding plant management or price policy. For one to presume otherwise, is to mistake and utterly fail to understand the psychology of the American business man. He resents any interference with his right to adopt his own policy in every particular. There is not the slightest likelihood that all the statistics that can be gathered, and the fullest discussion of all the actual facts concerning an industry, will put an end to differences of opinion. THE

POSSESSION OF COMMON INFORMATION ABOUT SUCH MATTERS IS NOT GOING TO ELIMINATE THE AMBITION OF MEN TO ATTAIN POSITIONS OF LEADERSHIP. The aim should be to bring the contests and all the facts out into the open.

All this is in accord with the report of the special committee appointed by Secretary Hoover, as chairman of the President's conference on unemployment, which report is now being made public. It has to do with the stabilizing of prosperity. That committee said among other things the following:

> "The committee considers that before banks, business men and others can take constructive action in the enlightened conduct of business in this relation, there must be recruited and constantly disseminated the fundamental information on which the trends in business can be properly adjudged by each individual business man, and it strongly recommends the recruiting of enlarged and more systematic statistical information by the Department of Commerce, and its wider dissemination."

Such information cannot be obtained in any other way than through an organization similar to this Bureau. The provisions of the Bureau's contract relating to the binding of the members, regarding matters voted upon at the meetings, had to do with those things which might properly come before the meetings, and chiefly details of management, expenses, etc. There is nothing in the contract which contemplates, nor was anything done to bind any of the members to an illegal agreement, as has been presumed. The members, also, were free to ask or answer only such questions as they desired. The record does not show that any member was criticized for pursuing any policy he saw fit, in any way that could possibly be regarded as a direct restraint upon competition.

4. COMMUNICATIONS BETWEEN BUREAU AND SUBSCRIBERS.

Now, it would seem reasonably clear that if the Bureau was to succeed, it would have to have all sales and all price changes reported promptly. If a subscriber would send in word to the effect that he was quoting oil to the trade at $1.43 a gallon, when in reality he was quoting oil at $1.40 a gallon, then the information possessed by the Bureau would not be true. If he made sales and through inadvertence or otherwise failed to report them, then the Bureau, to that extent at least, failed to have complete market news. If a number should follow this policy, the service of the Bureau would be unreliable and valueless.

A case cited by counsel for the Government in their brief, page 77, from which we quote, is fairly typical:

> "On December 11, Spencer-Kellogg Co. wrote the Bureau asking that it ascertain as to the accuracy of a report that the Midland Co. had quoted a customer located in zone 3 on the basis of $1.48, raw oil and tank cars: * * * (Rec. 364).
>
> "On December 19, the Midland Co. replied that their agent in Pittsburgh denied that he had submitted quotations in zone 3 on a basis of $1.48 per gallon in tank cars."

There are a number of cases of this nature all set out at length in the brief of the Government. Now, under the plan of the Bureau a subscriber had the right to sell oil at any price he pleased, but when he changed his price, he was immediately to notify the Bureau. Otherwise the subscriber would have the unfair advantage of making the other subscribers believe that his asking price was one price, while he was in fact offering oil, or selling it at a lower price.

This regulation of the Bureau was not to avoid competition, but to maintain it, by verifying the accuracy and

completeness of its reports. If the subscribers generally were offering oil at a price around $1.43, and the Midland Company, for example, was secretly offering oil or selling it for $1.40 when its price as listed with the Bureau was $1.43, then the Midland Company was avoiding the competition of the other subscribers. If the other subscribers had known that the Midland Company had cut its price to $1.40, undoubtedly some or possibly all of them would have done the same and there would have been competition, but if the Midland could cut secretly it could avoid competition.

As has already been pointed out, knowledge of the prices in a market is necessary to competitive selling, and in so far as secret price cutting is successfully indulged in, competition is in fact avoided.

In all the cases cited by the counsel for the Government, in fact in all the cases in this record, where attempts were made to ascertain what, if any, prices were made, and not reported to the Bureau, thence to the subscribers, and then through them immediately to *all* the trade, the inquiring subscriber as well as the Bureau was insisting on full information in order that all competition might be met, and not avoided.

Suppose that on a stock exchange part of the members should make their trades in secret, the position of the exchange as an open market would be destroyed. Suppose that some cotton planters in reporting to the Government should show a much smaller acreage planted to cotton than was in fact planted, so that the price might be run up and their own holdings increased, the Government reports would be a fraud and would be valueless.

The only chance for the Armstrong Bureau to perform its economic function was for it to see to it that reports made to it were at all times true, that reports were not

delayed or suppressed. It honestly tried to make its reports trustworthy, and it was proper to insist upon complete reports, which was the purpose of most of the correspondence.

The right of the subscriber to reduce his price at any time was not affected. This must be clearly understood. But the subscriber did not have or claim the right to report one price to the Bureau and a different price to the trade.

Commencing on page 39 of the Government's brief, are quoted certain letters between the Bureau and the members, from which the inference is made that artificial factors entered into the making of prices. The contents of these letters prove exactly the contrary. It was expressly stated in the Bureau's letter, there mentioned, that the service did not contemplate the directing of any member as to what prices anyone should feel he should make. The true purpose was to direct the members to a study of all the basic facts and THINK about what they were doing, not become frantic. To tell a business man that he should not allow himself to become hysterical and stampeded is proper, because it does more good for the consumer than even the producer. A producer must always bear in mind that he should in so far as possible protect his own customers, and give them a fair chance to unload, if they be heavily stocked, at gradually declining levels. The public does not profit by a "wide open break" in a market. Stocks cannot be liquidated in a week. On a rising market, like the Linseed oil industry and every other industry passed through in 1917 and the first nine months of 1918, speculation becomes rampant. Oil went from a low of 91c per gallon in January, 1917, to a high of $1.92 in September, 1918 (Rec. 681). The public always buys heavily on a rising market, because of the fear of further advances. Inventories become swollen to abnormal proportions.

The opposite is always true on a declining market because of the fear of further declines and the desire to get in at the very bottom. When buyers have "loaded up" at high levels, and there is a cut of 31c a gallon in the price of oil in three weeks, as took place in the fall of 1918, that means not only the wiping out of the profits of the consumers, but heavy losses, unemployment, stoppage of buying and general depression. All this is too plain for argument. Such conditions lead directly to mergers and more mergers, combinations to save the weak from the ignominy of bankruptcy. Prices must and will go up, and just as surely they will come down.

The essence of these letters is no different from that proclaimed and heralded broadcast, everywhere on every occasion by every captain of industry who talks about business conditions. It could have been read in every newspaper, and Government report. Suppose the Bureau had clipped similar comment from the newspapers and mailed it to the members so as to cause them to pause and think? Would the fact that it had been circulated through this Bureau have deprived the members of their freedom of contract? The letters themselves show differences of opinion. Spencer-Kellogg replied that they took the initiative in making their reduced prices because they felt that the time was ripe. If they were bound to act in unison, as is assumed by the Government, that company broke its agreement. Nothing was said or done about forfeiting any bonds as penalty for breach of contract. When economic facts impel a reduction in prices there is always keen rivalry to be the first to initiate the same, so as to thereby get the benefit, whatever it may be, in the nature of enhanced favor with the trade.

The sole and only purpose of all this correspondence was to obtain all reports, and to urge the producers to use mature judgment in making their individual price

changes, and not lose sight of the customers' interests, to the extent that the decline should be orderly, gradual. The same low levels would be ultimately reached but with this difference, the losses would be so evenly distributed that no failures would result. The wholesaler and retailer should have a reasonable opportunity to pay off their indebtedness before the dollar increases too much in its purchasing power.

As always, many factors enter into price changes and movements, and the law does not require the business man to ignore any source of information that will cause him to study the basic facts upon which his individual judgment should be grounded before he institutes any change, up or down, in prices. To require him to meet or refuse to meet, any specific price that might have been quoted is likewise not required. The law does not compel competition, but rather that no one shall bind himself not to compete.

Business men lack time and facilities, except as aided through organized effort, to collect data requisite to enable them to properly interpret immediate complicated industrial problems, in the light of the past, and a service that sounds general notes of warning and caution is for the public good. Depressions and periods of inflation would be made as moderate in degree and duration, as possible. The depression of 1900 was followed by recovery in the next two years. The crisis of 1903-4 was succeeded by the prosperity of 1905-6. The panic of 1907-8 was followed by the good years of 1909-10. The prosperity of 1912 saw a reaction in 1913-14, preceding the world war. The war orders of Europe brought runaway markets in 1915-16. Our own entrance into the war in 1917 resulted in disturbing industry, which continued until after the signing of the armistice in the fall of 1918,

which in turn gave way to the great wave of prosperity and period of rising prices in 1919 and 1920.

The recent great rise in prices is the third this country has witnessed in similar amount during the last 110 years. The first in 1812, during the Napoleonic wars, the second during the Civil War, and the last during the World war. Each of the first two periods was followed by a 30-year period of irregularly falling prices, and a 20-year period of generally rising prices. Periods of prosperity generally have culminated in bursts of speculation, and times of depression have resulted in insolvencies, idleness, want, and discontent. These extremes are undesirable, and knowledge of business facts can go far toward avoiding them. It is inconceivable that the law should compel a situation whereby commercial industry must look forward to an indefinite future of these recurring attacks of business and industrial chills and fever. The Federal Reserve system has done much to minimize these attacks. Business statistics currently gathered and promptly available is another preventive.

IN PROPORTION AS KNOWLEDGE OF BUSINESS CONDITIONS AND PRINCIPLES OF PRICE MOVEMENTS BECOME MORE GENERAL THE EXTREMES OF THESE FLUCTUATIONS WILL TEND TO BE SHORTER AND LOWER, AND THE TIMES OF TRANSITION WILL TEND TO COME AND GO LESS RAPIDLY.

The weeks immediately preceding the signing of the armistice in the fall of 1918, which is the period when the letters in question were written, were full of uncertainty; business men were not thinking clearly. Oil declined 31¢ per gallon when flaxseed went up. Individual forecasting as to business conditions was extremely erratic and divergent views entertained. The crushers were compelled and had a right to consider the fact that their customers had purchased their requirements at higher prices, and

were obligated to accept the amounts ordered. Therefore it was also correct for the Bureau to call their attention to this fact, and then do as the Bureau told them to do, use their own judgment in the light of all the facts. A precipitous decline in prices, especially when not justified by economic facts, does infinitely more harm and damage to the public, than a corresponding rise in prices, because in the latter case prosperity becomes general and previous commitments can be met promptly.

However, by the same token, it is necessary that overexpansion be prevented. When orders are plentiful and profits large, when prices are high and selling is easy, the time has come to be careful, and to exercise caution. In line with this same trend of thought, and a regard for that which would be in public interest, the Bureau sent out a letter on July 8, 1919, to the members, which was a strong warning against selling at too high prices. It was an attempt to have the members exercise individual judgment to relieve the industry of speculation and make substantial sacrifices, even to the extent of eliminating all profits. There was no suggestion in the letter to put into effect any specific price, or maintain any price, but merely a warning against over speculation and inflation (Rec. 448). But prices of flaxseed at this time were the highest in the history of the industry, reaching approximately $6 per bushel. Consequently prices of oil did go up like those of all commodities till about the first of September of the year 1919, and from then on there was a continual recession in prices.

The months of December, January, February and March, referred to in the Government's brief are always periods of inactivity in the linseed oil industry, and during those times there are few, if any, price changes. During that same period, however, the price of oil fell 10c a gallon from a price which was unusually low, in the

light of production costs, and added to the drop of 31c per gallon which took place just prior, made a total reduction in a few months of over 40c a gallon. The argument of counsel would seem to be that unless there be an incessant altering of the price of even a standardized commodity, like linseed oil, even after it had struck bedrock, production cost, a criminal agreement had been entered into.

The communications were entirely proper, in public interest and designed to make the reports prompt, complete, and when so made the Bureau was performing a lawful service.

5. Prompt Reports, Efforts to Secure Same.

Statistics of any kind, unless wanted for historical purposes, must not be of the cold storage variety. For that reason every possible effort has been made for the past two years and is now being made by the Department of Commerce, to distribute to the public quickly and promptly the data which that Department is gathering, chiefly from trade organizations. If there be a surplus of sugar those dealing in that market should know it as soon as possible, and avoid purchasing large quantities at high prices. Prices quoted to the trade by some competing sellers, and made known to other sellers, are instantly quoted by *all* the sellers to all their customers. This is especially true of reduced prices. The public gets the news quickly. The sellers will always see to that. If a price has been quoted and thus made known to the public, and later a lower price is made, that lower price should be reported immediately, so that competitors and buyers could get the advantage of a depressed market to the extent that any price might or might not tend to exert such an influence. Any price that has been quoted to

the trade is an actual fact, and it should be made known promptly and correctly, so that any other person could meet it or not as he saw fit. Likewise in order that the buyer, learning of a lower price, which he always does through the sellers, if the sellers are informed about it, might conclude that the market was falling and he might decide to wait longer before making commitments.

To endeavor to defeat enlightenment in this day and age is an absurdity. In the days of Adam Smith, a merchant could keep secret to himself a high or low price, for several months. Today, every successful concern learns of its competitors' prices in some manner, reliably or unreliably, almost instantly after the same have been submitted to the trade. The only difference in getting others' prices from buyers and in a haphazard manner, from getting them direct through this central Bureau, is in the latter case they are true facts, and based upon actual conditions rather than upon hearsay, rumor and in many instances misrepresentation, and also they reach the trade in this way much more quickly than if they were not reported to all competitors.

The defendant crushers in this case acted no differently than they would have acted had there been no Bureau, as regards the meeting of a reduced price or following an increased price, nor did they act any differently than any other business man. There are times and conditions, sometimes peculiar to the particular individual, and sometimes based upon a conception of general circumstances, when one competitor will meet a lowered price, and again he will refrain from doing so. A company well financed frequently refuses to meet a cut price, because it does not want to break the market at that particular time. A company less favorably situated, and badly in need of orders would generally adopt a policy of meeting every price that happened to be quoted, regardless of conse-

quences. But there is no law condemning one for merely obtaining information which will enable him to refrain from competing against himself. He cannot agree to refrain from competing against another. That is different. If, as this record shows without contradiction, buyers endeavor to take advantage of a seller, by representing that he, the buyer, has a lower price than he really has, and thereby induces the seller to reduce his, the seller's own price, the seller must have the right to check that information. The true facts can be obtained in no other way than by and through the other competitors. Competing against one's own lowest price is not competition. Such information for such purposes should be not only dependable, but prompt. The Bureau's efforts to obtain prompt reports cannot be condemned.

Just to the degree of promptness with which the reports were sent to the Bureau after having been made to the trade, to that extent was competition accentuated. Two salesmen are after a large order. It may be that within a few hours one learns of a lower price made by the other. Having received it through the Bureau he knows that it has in fact been made to the trade, consequently if the second salesman wants the order he probably would have to either meet or cut under the price with which he was competing. If the reports be delayed, and the order placed there would be no incentive to meet that competition at that time.

At this point it would be well to answer the question asked on page 157 of the Government's brief, namely, "Why were they required to report all cuts in prices, and not required to report sales at prices in excess of those given in the price lists?" The Government then presumes that there could be but one purpose and that was to prevent cutting. To one utterly unfamiliar with industrial conditions and methods, it is impossible to con-

ive that knowledge of such cut prices could be sought r the purpose of meeting them, and thereby retaining e's own customers, and also to avoid competing against e's own lowest price. As stated in the language of District Judge:

"A merchant cannot compete with another merchant unless he knows what he must compete against. A knowledge of what his competitor is charging is the first step in competition. It does not follow because one man knows the price which his competitor is asking, and he then fixes the same price, that his action is by agreement. * * * The defendants, however, have shown, and their evidence is uncontradicted, that the deviations before existing were caused by the individual producers endeavoring to meet prices of their competitors which had never been made; and it is common in the trade for buyers to make false representations as to the prices made by other producers. SURELY, SUCH A CONDITION IS NOT THE ONE THAT THE SHERMAN ACT AIMS TO FOSTER." (Capitals ours.) (Rec. 45 and 46.)

would seem from the statements made by counsel for Government, that every statement, every act, every ess disavowal of intention to do wrong, designed to ly with what the law really requires, is evidence of lty purpose, and is an indication of a guilty conce endeavoring to conceal crime. If increased prices been reported, the Government would have said, less, it was for the purpose of inducing others to their prices. There is no charge and no evidence he prices reported were not true and complete, upon actual sales or upon actual offers to buy and offers to sell, including the lowest. They were not ed prices. So, of course, the only point counsel have in mind is, that the mere reporting or making of the "cut price," and the meeting of that price ers (which is competition), would operate as a de- and thereby in and of itself prevent the making

of a reduced price. But the evidence shows that prices were reduced. That argument proceeds upon the ground that merchants today can make low prices and keep them secreted from their competitors. Such methods are attempted in these times only in rare instances, by small concerns doing business in a restricted area, and even then without any success.

Buyers and sellers alike do and should know what prices are prevailing in the market. In the final analysis, the contention doubtless is that when the prices were reported through the Bureau, in the process they became associated with an influence, that resulted in group opinion, and a member would be deterred from making a lower price, whereas, if he were not a member of the Bureau he would not be subjected to such an intangible and indefinable persuasion. That would mean we should have a rule of law, in favor of making prices known, which obviously could not be prohibited, but they must not be made known to and among competitors through a central Bureau, in a systematic and regular manner. Such a rule of law would be based upon fear that co-operation to the extent of competitors filing all their reports and not merely selected reports would put the competitive principle in peril, and it would attach an exaggerated estimate upon such co-operative principles.

To admit that any merchant hesitates to put out a cut price, because it might result in establishing a lower level, is only to admit an obvious truism. It militates against his getting as much for his wares as he individually feels under all the circumstances he should receive. But his reluctance to descend to lower levels is for the same reason, whether he be a member of the Bureau or not a member,—possible lessened profits. Since he must know that his prices will become known to the trade generally, there can be no objection on his part to publish

ing them through a Bureau, where they will be reported correctly and without misrepresentation, and as above stated, will reach the trade more quickly and more generally than otherwise. In other words the reluctance or the hesitation to make lower prices in any case does not result from cooperation to file reports with a Bureau.

Concerning the time the quotations were sent to the Bureau the record is clear that the prices were first quoted to the trade, with one possible exception, caused through a possible misunderstanding.

> "As to the information we gave to the Armstrong Bureau, when we would quote a price on linseed oil we would report that price to the Bureau within two or three hours after the time we had made the quotation" (Rec. 76).
>
> "When we decided to change the price, we made the quotation, notified our agents, and immediately thereafter notified the Bureau" (Rec. 110).
>
> "Never advise the Bureau what you intend to do, as the Bureau can clear information only on action that has already taken place. To make this point clear, do not send to the Bureau a statement such as 'we enclose herewith price lists which will become effective next week.' When you file information with the Bureau covering any of your quotations to your trade, such information can only be filed immediately after such action has taken place, and the form for reporting such information is, 'We hand you herewith price which we have today quoted our trade'" (Rec. 334, 5).
>
> "As you are aware the Bureau is not at liberty to accept or publish information concerning any prices that you may intend to ask, and it is therefore proper for you to wire us quotations only after they have been made" (Rec. 733).

During the trial of this case in the District Court, Mr. Mairs of the Archer-Daniels Linseed Co., received a wire from his office in St. Paul which is Plaintiff's Exhibit 17 (Rec. 675-6), in which it is stated that after November

17, 1919, prices were wired to the Bureau ten minutes before sending the quoted prices by wire to their agents. It may be doubtful whether that was really done, but even if it were done, it was only in the case of that one member on those occasions, and was directly contrary to the instructions of the Bureau, and as far as the evidence shows there is nothing to indicate that the Bureau had any knowledge of the fact that its instructions were not being literally followed in this one instance. Mr. Mairs might have reasonably believed that since the quotations were wired to his agents a few minutes later, that such was a compliance with the Bureau's instructions. The advices of the Bureau in this behalf were explicit, and oft repeated, and literally followed by all the members, except perhaps to this extent in this one case, to the effect that only those quotations which had been made in good faith to the trade, were to be reported.

> "In the final paragraph of your communication above referred to, Mr. Ankeny, it is evident that you have completely overlooked the fact that this Bureau clears only information on past transactions, and therefore it will be unlawful for you to advise the Bureau of any changes in your prices which you have not actually quoted to your trade" (Rec. 613).

Prompt reports were certainly sought for by the Bureau, and the Bureau in turn endeavored to promptly forward the information to all the crushers and consequently they reached the entire trade, not merely a few favored customers, much more quickly than would have been possible under any other circumstances. The only value of the news lay in its immediateness. If one subscriber would cut the price from $1.46 to $1.43, and the others did not know it for a week, then when the buyers became aware of it, the trade would all be gone. The subscribers must be promptly informed if they were to compete with the changed price. The requirement of prompt

reporting was necessary if the Bureau was to function as a market news agency, and enhanced rather than militated against its lawfulness.

6. ZONES.

For an accurate understanding of the zoning system as used by the Bureau, it will help to note the following points:

It is conceded that

1. *The zoning system did not fix the base price,* but merely related to the differentials (Gov. Br. p. 33).
2. Zoning system in this industry was always in use, a long established custom, and recommendations of Bureau simply defined that usage, and resulted from desire and demand of trade for quotations f. o. b. point of delivery, or freight allowed; for convenience of customers, and avoidance of figuring separately on each transaction amount of freight (Rec. 70, 71, 96, 117, 119).
3. Base price determined by flaxseed market, and the base price was the price at the manufacturing point nearest to the actual supply of flaxseed, and hence the cheapest price. If the greater supply came from the northwest, Minneapolis was taken as the base, if from Argentina, New York was the base (Rec. 78, 79, 82, 96, 99, 109).
4. Zone differentials in no respect affected prices quoted trade, related solely to freight which was allowed, and made no difference in method of quoting (Rec. 78, 107, 125, 151).
5. Zoning principle for establishing freight rates approved and followed by Interstate Commerce Commission, and differentials recommended by this Bureau coincide with the differentials for freight given Bureau by Lent Traffic Bureau (Rec. 131 and 141).
6. BUYERS ALWAYS HAD OPTION TO BUY F. O. B. SHIPPING OR DELIVERY POINT. BUYERS COULD ALWAYS OBTAIN QUOTATIONS WITH OR WITHOUT FREIGHT ALLOWED (Rec. 79, 109, 117, 151).

Laws should be framed and interpreted so as to fac
tate rather than impede the transaction of business. A
system that will simplify the application of complicat
freight schedules to the sale of commodities, without pu
lic detriment, should be encouraged. Freight tariffs a
so voluminous, intricate and complicated that only a f
of the specially trained can master them. Hundreds
experts thrive upon their ability to ferret out errors
overcharges, made either by the employes of the railroa
or the traffic managers of large industries. Furthermo
there are commerce experts who, working on a continge
basis, come along after the trained experts of the traf
departments of the railroads and the large industri
have completed their work, and discover mistakes whi
lead to the recovering of large sums. Since that is tru
how can the average purchaser be expected to know an
thing about what freight he should pay?

When applied to a standardized commodity, like li
seed oil, a zoning system enables a buyer to instantl
segregate the amount of the freight from the quoted pri
of oil, and at once compare prices received from diffe
ent sellers. His prices are readily comparable. Lik
wise it makes for the convenience of the sellers in tha
they can the more readily compare the prices of thei
various competitors, which is one of the reasons assigne
for the adoption of the zoning system by the Bureau
It tends to eliminate any opportunity for the indulgenc
of unfair methods, either as among competitors, or over
reaching of the buyer, through the juggling of freigh
rates. It positively tends to put the buyers upon a mor
perfect ground of equality among themselves in compe
ing for their own trade, because buyers are grouped int
larger areas, all of whom receive the same rates, and
thereby gives no undue advantage to any particular in
dividual who might happen to be situated at a more ad

vantageous point. It distributes and brings about more perfect competition,—freer competition, by tending to eliminate one factor which militates against free competition, namely advantage solely because of location and the construction of a particular railroad.

On page thirty-three of the Government's brief appears the following:

> "The adoption of this zoning system was, in itself, an unlawful agreement in restraint of trade, because, *while it did not fix the base price to be charged by each of the manufacturers, yet it did obligate them to observe these fixed differentials, and prevented them from meeting special competition that might exist in other zones.*"

That is not at all clear. Concededly the base price was the cheapest because it was the price quoted by the manufacturer located at or nearest to the point of supply of flaxseed, and furthermore was the price quoted by the manufacturer who had progressed farthest in productive efficiency. The freight differential was a mere incident, and had nothing whatever to do with the ultimate price of oil to the consumer. The freight, whatever the amount, was paid by the crusher. If oil at a given point was 80 cents a gallon and the freight one cent per gallon, the quoted price would be 81 cents, but there is no such connection between the two as would prevent the seller from making a price of 75 cents per gallon, or in other words prevent the seller from meeting special competition that might exist in any other zone. It is purely an incidental regulation, based upon long established custom, and traffic differentials, paid by the manufacturer, and does not add to or subtract from the profits of the seller, and consequently does not prejudice the buyer. It does not restrain trade, it crystalizes competition, and has no connection with the methods of determining the price to be quoted. If the system did not fix, as con-

ceded, the base price, obviously it did not fix the price in any zone or place away from the base point. The crushers followed the freight differentials because they believed them to be the rates published by the railroads in the tariff schedules and as they were advised by the Lent Traffic Bureau. It is not disputed in the record that the freight differentials did check precisely with those published tariffs. Since that be true, there was no arbitrary element or factor in those freight differentials, and they are the amounts the crushers were compelled to pay the railroads for freight in every instance when oil was sold with freight allowed.

Since the freight added to the base price in the respective zones was allowed to the purchaser and paid by the crusher, it becomes immaterial whether the differentials as prescribed in the zoning system coincided to the fraction of a cent in each instance with the actual freight to every place. The freight designated and allowed and paid by the crushers was the amount for which the purchaser received credit. The freight schedules are not perfect, and concededly there are many inconsistent and discriminatory rates in the published tariffs. But they are as nearly perfect as it is possible for the railroads and the Interstate Commerce Commission to make them. The adding of the freight differentials for the respective zones in no wise prevented each crusher from meeting special competition whenever and wherever it might arise, and the record clearly shows that this was done.

All zoning systems approved by the Interstate Commerce Commission necessarily have points where the rates must change, so that one located just on the other side of the point where the change takes place, pays a higher rate than the person situated a short distance nearer the base point.

It is undisputed in the record that the buyers at all times had the option of buying f. o. b. point of delivery or shipment. If the buyers wanted to take title to the goods at the point of shipment and pay the freight to the point of delivery, they always had the privilege of doing so. As a matter of fact the crushers, under all the testimony, would have preferred to have done business that way, so as to have been relieved of the risks of leakage and damage in transit. The zoning system was better for the buyers in every way.

> "If the freight was higher to a certain point, or if a man wished to pay f. o. b. we would be very glad to sell him f. o. b., no matter what zone he lived in. The differentials adopted were based as near as possible on the freights" (Rec. 78).
>
> "A purchaser can always buy from us f. o. b. his place or f. o. b. our mill" (Rec. 117).

Concerning this zoning system, the trial court succinctly summarized his deductions from the evidence in the following manner:

> "Complaint is made against what is called the 'zone system' and differentials applying thereto. It is true the prices quoted had reference to certain well defined territory, and the prices were accompanied by differentials to equalize the cost of railroad transportation. The record shows that these differentials were adopted after a thorough investigation of freight rates from the base to the point of delivery, and the addition to the base price in the different zones, was arrived at after a fair averaging of those freight rates into the designated territory.
>
> "Zoning for the purpose of fixing freight rates is not new. The Interstate Commerce Commission permits it in regulating the charges to be made by the railroads. It is not a perfect system, and there is always a certain amount of discrimination to those who live on or near the dividing line between zones, and I have no doubt a few buyers of oil may have been to some extent penalized, BUT EVERY BUYER HAD THE OPTION OF PURCHASING F. O. B. POINT OF MANUFAC-

TURE OR F. O. B. POINT OF DELIVERY, AND I MUST ASSUME THAT THE BUYER WOULD CHOOSE THAT F. O. B. POINT WHICH SEEMED THE MOST TO HIS ADVANTAGE. (Caps ours.)

"The charge of the Government that the zone differentials were adopted in order that the price charged for oil would be artificially enhanced and the defendant crushers consequently enriched, is not borne out by the evidence. There was no zone in which all the crushers did business, and the bulk of the finished product sold by the defendants was for delivery in zones carrying minimum freight differentials" (Rec. 46, 47.)

7. Zone System as Applied to Less Than Car Load Lots.

As fully explained on pages of the record 402-4, quotations were made and freight allowed to point of delivery on orders for car loads or more. (Unless the buyer preferred quotations f. o. b. point of shipment.) In less than carload lots they customarily quoted f. o. b. point where warehouse stock was carried and from which point the shipment was made. It merely related to the method of making the quotations, and the fact that the customer paid the freight from the warehouse to point of delivery did not affect the price in an artificial way.

8. Efforts to Obtain New Members and Retain Present Members.

There is no question but that the members wanted as complete representation as possible. The purpose and intent of the Bureau was to co-operate in order to get full and complete industrial facts, in a dependable manner, and submit the same to the intelligent, independent action of each member. The independent judgment, in one instance, would dictate one course to be followed in the

light of such facts, and an opposite course in another instance. In each case the action taken would be on account of actual economic factors and conditions.

Whatever influence flowed from the reports was the result of and warranted by economic facts, always interpreted differently by different people. Therefore, in order to avoid effects that might possibly be condemned by the law, it is of the utmost importance to obtain complete facts. Partial data could very easily lead one to adopt a course of action that would not be warranted by industrial conditions. This is true as applied to both production statistics and price data. Reports might show that a few plants, on account of shortage of orders, had reduced their output, whereas if full reports had been obtained it would appear that there was no general shortage, and no occasion for curtailing output. Likewise concerning prices, a few prices would not reflect the general market conditions, either up or down, whereas, all prices made by most of those in the industry, in a large territory, over a considerable period of time would enable both buyer and seller to properly and correctly understand, and know what they should do.

The Department of Commerce is continually confronted with the problem of getting sufficiently adequate data to make the statistics which that Department publishes of some real value. It has been demonstrated that that Department cannot obtain enough statistics from individuals direct to be worth while, and that the recruiting of statistical data must come through the cooperation of many. It is also a fact that there can be no method to compel any person to forward statistics to a Department of the Government, or any other agency, it must be purely voluntary. Consequently unless a sufficient number voluntarily contribute similar statistics,

the work would be a failure, the expense upon the few would be burdensome, and the members would not participate.

9. Terms of Sale. Trade Acceptances.

Criticism is made that the Bureau or its subscribers made efforts to secure uniformity as to terms of sale, and it was recommended that terms of sale should be 1 per cent discount for cash settlement in ten days, or thirty days net trade acceptance from date of shipment.

Now the fact is that practicaly uniform terms of sale are to be found in every trade and industry, established either by custom or agreement.

A very elaborate study of the subject has been made by Mr. W. H. Steiner, of the Division of Analysis and Research, of the Federal Reserve Board. The results of his investigations are set forth in eight elaborate articles, published in the Federal Reserve Bulletin, beginning December, 1919, the last being published in the issue for November, 1920. The following are a few quotations:

> "Fresh meats are usually sold on a weekly basis, collection for all deliveries during a given week being made in certain cases by a specified day on the following week."
>
> "Cured meats however are sold to considerable extent on 30 day terms."
>
> "Coffees are largely on a net 90 day basis, discount for anticipatory payment being made at the rate of 8% per annum, making 25 the discount for cash."
>
> "Pig iron, whether steel making, such as basic and Bessemer, or foundry or forge, is sold upon terms of net 30 days from date of invoice or average date of monthly shipment."
>
> "Pig lead is sold largely on terms of net 30 days."
>
> "Mixed carloads of flour and feed are usually sold on annual draft terms, while in the case of straight carloads of feed the sight draft is employed."

"Terms of sale of refined sugar by refiners since 1911, have been largely 2% for payment within 7 days after arrival of shipment."

"Terms on condensed and evaporated milk sold by packers to wholesalers are generaly 1½%, 10 days, net 30 days from date of shipment."

"The general terms (for dry goods) are 2%, 10 days, 60 days extra, for many years recognized as the regular dry goods terms."

These are only a few of the hundreds of examples shown in this Government study.

Now, what does this mean? Simply this: that competitors in all lines of business have found it necessary for the convenience of their customers to settle upon some such common terms of sale. The terms of sale do not fix the prices, they are purely incidental, and they become established through general custom over a term of years. Suppose there were several kinds of money in use and competitors would all agree to quote in terms of one particular kind of money. It might be necessary to make comparative prices understandable. These uniform terms of sale have grown up so that men might compete understandingly. It is not only for the benefit of customers, but for the dealers as well. Otherwise it would be difficult to figure differences in prices.

Years ago, merchants built up a great body of customs which were agreed on, which were taken over into the body of English law under the name of the Law Merchant. Under it, for example, a money lender gave three days of grace. It was a part of the terms of the loan which finally by agreement became a part of all agreements for the loaning of money, which then became a part of the law.

These terms of sale as suggested through the Armstrong Bureau should be uniform throughout a business. It benefits business just the same as a uniform marine

insurance policy benefited English shipping. It is therefore not a restraint of trade or commerce.

As regards the use of trade acceptances, that matter was discussed on many occasions and the record shows that some did and others did not adopt the same.

Mr. Hurtz, witness for the Government and traffic manager for the Bradley-Vrooman Company, consumers of oil, testified:

> "I think the terms of sale are pretty generally known. They are pretty much the same. Q. All satisfactory? A. Yes, sir" (Rec. 57).

Other witnesses said:

> "The terms of sale under which the crushers have sold their products have generally been one per cent off in ten days, thirty days net. THAT HAS EXISTED EVER SINCE I CAN REMEMBER. It was recommended, while the crusher were connected with the Armstrong Bureau, to put on a trade acceptance, to sell ten days one per cent off or thirty days net trade acceptances. I should say we inaugurated the system, but if anybody objected to the signing of a trade acceptance we would not force it in any way. At the present time we are having trade acceptances attached to all our invoices. If people will sign them we like it that much better, because we can bank those trade acceptances, where we cannot if it is on an open account" (Rec. 78-9. Capitals ours.)
>
> "FOR THE LAST TWENTY YEARS, AT LEAST, THE TERMS OF SALE IN THE LINSEED OIL BUSINESS HAVE BEEN 30 DAYS AND 1% OFF FOR CASH IN TEN DAYS. THE CONDITIONS OF SALE WERE NOT ANY DIFFERENT DURING THE PERIOD OF THE OPERATION OF THE ARMSTRONG BUREAU THAN THEY WERE AT ANY OTHER TIME. There was some recommendation made with reference to trade acceptances. I never tried to impose them on any of my customers, but I did offer them the opportunity of giving trade acceptances, and I wrote them all letters in which I recommended the trade acceptance as being of benefit to them and me. They worked out very well with my trade. We are still using trade

acceptances in probably 75% of our business, which is not discounted for cash. The advantage of having trade acceptances is that I can bank them and get money." (Rec. 94-5. Capitals ours.)

"My company has used trade acceptances, and the Bureau service did not change that in any way. The phraseology of our terms is '30 days, trade acceptances net.' We have had that on our invoices since early in 1917 and perhaps before that" (Rec. 117).

Trade acceptances were advocated during and after the war by the Federal Reserve Banks, and by the Banks generally. It was thought that it would improve our financial situation if business men in selling goods would take trade acceptances or drafts drawn at a certain number of days, and should then cash the draft at the bank, the draft being later paid on its due date. It was thought that this was much better than to have the seller carry the indebtedness as an open account. It does not actually enter into the terms of sale. It does not affect competition, and the banks carried on the agitation for the use of these trade acceptances for the general improvement of business credit. Doubtless, much of the urging for the use of trade acceptances came from the Government itself. For business men to advocate their use certainly does not constitute a restraint of trade or commerce.

VIII.

IN ITS ACTIVITIES THE ARMSTRONG BUREAU AND ITS SUBSCRIBERS WERE FREE FROM ALL THE ORDINARY AND USUAL METHODS OF RESTRAINING TRADE OR COMMERCE.

1. No Restraint of Production.

There was absolutely no restraint of production, which is generally regarded as an essential ingredient of any plan to control prices. There was no suggestion that any crusher should at any time limit its production. Each

crusher was free at all times to manufacture as mu
linseed oil and oil cake as it cared to, and not only we
the subscribers free to do this, but they did do it.

> "MR. MITCHELL (COUNSEL FOR GOVERNMENT): M
> I SUGGEST, YOUR HONOR, THAT THERE IS NO CHARGE
> CURTAILMENT OF PRODUCTION" (Rec. 72).

2. NO LIMIT ON DISTRIBUTION.

Also there was no limit on distribution. There w
never any suggestion of a division of territory or a li
iting of operations in any particular territory. The mi
were scattered but all were actively contesting for t
business in the various parts of the country.

3. NO BLACKLISTING OF CUSTOMERS.

There was no conduct on the part of the Bureau or
its subscribers looking towards the blacklisting of a
customers. It seemed to be the desire of all to give op
terms and prices to the trade, and to treat all on an equ
basis, without favoritism, and without partiality.

4. NO ATTACKS ON BUSINESS RIVALS OR ATTEMPTS
COERCION.

Neither the Bureau nor its subscribers started a
trade wars, nor any attacks on rivals for the pu
pose of injuring a competitor, whether connected wi
the Bureau or not. There was no form of coercion us
to induce outsiders to become subscribers to the Bure
There were no raids made upon the business of those ou
side the Bureau, nor was the Bureau used as an instr
ment to injure those who were not subscribers.

5. No Agreement as to Prices.

There is nothing in this record to show that at any meeting, or at any place else, any agreement or understanding as to price was ever hinted at or suggested.

The various defendants went on the witness stand and all testified freely and frankly and there was no testimony from which any hidden agreement could even be suspected.

These are negatives of course. But if these defendants had intended to limit trade and commerce, they as practical men, could not have avoided some of those direct methods which in one form or another have appeared in most of the trust cases in this country.

IX.

THE ACTIVITIES OF THE ARMSTRONG BUREAU DID NOT RESULT IN A RESTRAINT OF TRADE OR COMMERCE BUT RATHER ACTIVELY PROMOTED AND DEVELOPED TRADE AND COMMERCE IN THE LINSEED OIL INDUSTRY.

1. A Tendency Toward Uniformity Proved Competition, and Not Lack of Competition.

We now come to the crux of the whole question, the point on which the whole case of the Government is predicated. The case of the Government in our opinion is based on an assumption of economic theory which has no support among economists, and which is contrary to business experience, and not sustained by law.

Counsel for the Government state:

> "The requirements with reference to statistics constitute the basis upon which the system rests" (Gov. Brief, page 156).

In other words, lack of competition directly results from the exchange of statistics and particularly on account of the immediate reports of price changes,

The theory is that at the very beginning by exchange of prices through the Bureau, fluctuations in the price of linseed oil were reduced, and the prices of all the subscribers soon became practically uniform, and that this uniformity showed a lack of competition. In the court below in their argument, counsel for the Government devoted much attention to the lack of a "spread" between the prices of the various subscribers at a given time. In their brief in this court, they endeavor to point out instances of uniformity, but avoid making the direct argument made in the court below that this uniformity spells "agreement."

It certainly does not spell any such thing, and to assume that it does is begging the question. It must be remembered that we have in effect a country wide market for linseed oil. These various crushers were competing for the sale of oil in a practically country wide market. Here was a large body of sellers seeking the same buyers. Now in such a situation, what result is brought about by an exchange of information as to prices? The great English economist, William Stanley Jevons, in his work, The Theory of Political Economy, page 84, states:

> "It is of the very essence of trade to have wide and constant information. A market then, is theoretically perfect only when all traders have perfect knowledge of the conditions of supply and demand, and the consequent ratio of exchange; and in such a market, as we shall now see, *there can only be* one ratio of exchange of uniform commodity at any moment.'

Also, at page 90:

> "In the same market, at any one moment, there can not be two prices for the same kind of an arti-

cle. Such differences as may practically occur arise from extraneous circumstances, such as the defective credit of the purchasers, their imperfect knowledge of the market and so on."

The same view is set forth by Prof. F. W. Taussig, Professor of Economics in Harvard University, in his "Principles of Economics," page 149:

"And, in any market where dealings are habitually conducted on a considerable scale, there will be an equilibrium price, which, though not rigid, is maintained between comparatively narrow limits, and that price will represent the judgment then currently held of the probable seasonal price."

The principle is set forth by Prof. Fred M. Taylor of the University of Michigan, in his " Principles of Economics," already cited, at page 280 under the heading

"The Law of Single Price.

Within the limits of a truly single and theoretically perfect market, no commodity can have more than one price at the same time; and even within the limits of imperfect markets or groups of connecting markets, any commodity must tend to have a single price,—allowance being made in the latter case for the expense of shifting from one to another of the connecting markets."

Also Prof. Fred E. Clark, of North Western University, in his "Principles of Marketing," already quoted, at page 427, makes the statement:

"It should not be concluded however that the existence of common prices in all stores selling a particular commodity is the result of an understanding between the stores. *A condition of free, untrammelled competition with large knowledge of the market also causes uniform prices to emerge.*

It is very common, for example, for housewives, to go from store to store, comparing prices and 'shoppers,' sent out from stores are constantly visiting competing stores to compare the price and quality of merchandise."

And further:

> "Many stores determine their prices from the prices which competitors are charging. A single store often takes the initiative and others follow, marking their prices at, above, or below the competing price, according to their general policy."

And, on page 429:

> "Each vendor watches his competitors."

Now, in so far as all the manufacturers of linseed oil were informed as to the prices asked by their competitors, which, as above explained, are thereby the more quickly quoted to ALL the trade, to that extent did the principle of competition operate. In so far as the information was distributed by the Armstrong Bureau, then to that extent competition was increased.

The tendency, if any, toward uniformity of price of linseed oil proved that there was competition between the crushers, since there was no agreement among them as to a specific price. That there was no agreement among them as to a specific price is shown by the great changes in price. For example, on October 1, 1918, nine subscribers quoted spot sales at $1.79, one subscriber at $1.81, one subscriber at $1.85, and one at $1.89. Now, it is submitted that if these facts were known throughout the market, the subscribers who quoted the higher prices were not competing. They were out of the market. Take for example, November 9, 1918, as recited in the brief of the Government, page 125:

> "On that date, nine members were quoting at $1.58, two at $1.61 and one at $1.49. There were no changes in these quotations until November 25 when one member reduced from $1.58 to $1.53. *On the following day nine members reduced to* $1.53."

Counsel for the Government italicized the statement—because to them this decrease in price by nine subscrib

ers to $1.53, meant that the subscribers had got together and agreed on the lower price. The assumption is childlike and naive. What happened was that the nine subscribers found that if they were to sell oil they would have to meet the price of $1.53, made by one of the subscribers.

Further, quoting from the Government Brief, page 125:

> "On the 27th of November, one member reduced from $1.61 to $1.56, and on the 29th, this member further reduced to $1.53, on which date eleven members were quoting at $1.53, and one, Sherwin-Williams Co. at $1.49. These quotations were continued without any change throughout the month of December, and until January 14, 1919, when two members reduced their quotations from $1.53 to $1.48 (Rec. 185). On the following day, January 15, these same two members reduced from $1.48 to $1.43, and eight members reduced from $1.53 to $1.43, six of them quoting a reduction to $1.48, during a part of the day, but closing their quotations at $1.43.
>
> "On January 16th, another member reduced from $1.48 to $1.43. Thus in three days all the eleven members that were previously quoting at $1.53 had reduced to $1.43, still leaving one, the Sherwin-Williams Co., quoting at $1.49."

Now, what do these operations mean? An agreement? Not at all. These manufacturers were being forced by competition to lower their prices to meet the price of the lowest. Whatever approximate uniformity existed at different periods was brought about by the competition, as the Government Brief shows, and the District Judge found.

The Counsel for the Government go on to state:

> "These identical quotations continued through the remainder of January and until February 17, when the Sherwin-Williams Company reduced to $1.43."

Evidently the Sherwin-Williams Co. was forced down by the lower price of the others, that is by competition.

The Brief further states:

> "This uniformity continued until March 5, when five members increased their quotations from $1.43 to $1.48, and on the following day, the remaining seven members then quoting, increased their quotations to $1.48,"

so on through a series of rises to $2.20, then through a series of declines with drops of as much as 26 cents, and with periods of uniformity.

Finally counsel state, page 128:

> "Thus, on the day the original bill in this case was filed, one was quoting at $1.58, one at $1.60, one at $1.62, one at $1.66, one at $1.68, and five at $1.69."

This rise and fall of price with breaks by individuals followed by others either up or down is as good an example as can ever be found of an untrammelled market with free competition. Of course periods of uniformity result when the prices reach certain levels. But linseed oil is a manufactured commodity. It is crushed from flaxseed which is bought up in advance for manufacture at a fixed price, with definite costs for manufacture and it would not necessarily rise and fall every day like wheat or corn or flaxseed itself. It was a staple and standard commodity and the price was less changeable when a price level was reached.

When the plan was attacked by the Government, it naturally ceased to function very well, and nearly every subscriber had a different price on the day the bill in this case was filed. On that day, the lowest price was $1.58, and the highest was $1.69, a variation of 11 cents.

Counsel for the Government, from this fact, would infer that the subscribers were again competing. Such

a spread of prices shows lack of competition and that is the situation which results when men are compelled to trade in ignorance. It is as ludicrous as two blind men trying to fight a duel. Yet it is to this condition that counsel for the Government desire to bring all business concerns of the country.

Beginning at page 128, counsel for the Government discusses quotations of the subscribers for future delivery, on page 129, they say:

> "As to quotations for November delivery, 1918:
> "As the association began to function on the 1st day of October, no quotations are given previous to that date. All quotations submitted for the first seven days of October were $1.71. On the 8th, six of the nine members reporting changed to $1.66, two remained at $1.71, and one changed to $1.76."

It is evident that competition was not very strong.

> "But on the 26th, nine of the twelve members reporting were quoting at $1.55, one at $1.56, one at $1.63, and one at $1.76."

Those at the higher levels were out of the market.

> "By the 30th, the nine that were quoting on the 26th at $1.55 had changed to $1.51, while the other three had retained their former quotations."

The nine who were reducing their quotations from $1.55 to $1.51, were certainly competing.

Further, counsel for the Government state:

> "On November 1st eight out of twelve members were quoting at $1.51, one at $1.49, one at $1.53, one at $1.56 and one at $1.73. By the 8th, eight of the members had changed to $1.58, one was still quoting at $1.49, two at $1.53 and one at $1.73.
> "These quotations continued until the 25th, when another member changed from $1.53 to $1.58; and on the 26th, ten out of twelve were quoting at $1.53, leaving one still quoting at $1.49, and one at $1.73. This continued to the end of the month."

The fact that the market was imperfect is shown by the wide variation in price at a given time. A spread of from $1.49 to $1.73, as existed at the close showed clearly that somebody was out of the market or else that price was no object to the buyers. It is apparent that the ten who were asking $1.53 at the close of the month were after the business, although the demand was such that they did not feel forced to the price of $1.49, which one of the subscribers was asking.

Further, counsel state as to quotations for January delivered 1919:

> "On November 26th, all quotations for this month were at $1.53, *and they remained uniform at these figures throughout the entire month of December.*
>
> "By this time, the system had begun to properly function."

That is exactly right, the system had begun to function. Instead of each seeking for business at a higher price, his knowledge of the situation together with his desire for business forced him to a lower price. It is an example of the working of the law called by Prof. Taylor of Michigan, the "Law of Single Price."

But counsel for the Government state further, in their brief, at page 130, as to quotations for February delivery, 1919:

> "Quotations for this month were uniform at $1.53 from November 26, throughout December, and until January 14. On that day, two members changed to $1.48. On the 15th, ten members dropped to $1.43, five reducing first to $1.48 and at a later hour to $1.43. On the following day, January 16, all were quoting at $1.43, and the quotations continued uniform to the end of the month."

What of it? Because a price reaches a level proves nothing, and obviously there was a level below which they would not go. That they finally reached the level of the

lowest in price proves that they were all competing. Otherwise some of the subscribers would have held to higher prices.

The other cases cited by counsel for the Government, are of the same character, through an advancing, and then through a falling market. Finally, counsel state (page 135 of the Government Brief):

> "The tendency downward which had begun about March 11, was continued, and on May 1, nine members were quoting at $1.72, one at $1.70, and one at $1.79. Still further reductions followed until the 29th, the date of the last quotation, when eight were quoting at $1.72, one at $1.60, one at $1.62, and one at $1.65."

In his book, "Some Problems in Market Distribution," Arch Wilkinson Shaw, at page 51, makes the following statement:

> "The producer who today enters the market to manufacture and sell a commodity *in competition* with other producers of substantially identical products has open to him three general price policies. He may adopt one of these to the exclusion of the others, or may use them in combination.
>
> "These three policies may be termed (1) selling at the market minus, (2) selling at the market, and (3) selling at the market plus.
>
> "(1) *Selling at the market minus,* is that policy which aims to increase sales by reducing price.
>
> * * * * * *
>
> "(2) *Selling at the market,* has been the policy perhaps most characteristic of our scheme of distribution during the period when the stress was on production. It is still a common policy in the marketing of staple goods.
>
> "This policy consists briefly in the acceptance of the market price existing for the commodity as a fixed condition. * * * He, (the producer), recognizes the market price for such a commodity as something objective, and sells his commodity at the established level.
>
> * * * * * *

"(3) *Selling at the market plus,* is perhaps the most characteristic price policy of modern distribution.

* * * * * *

"They (exceptionably able distributors) isolate their product, and establish it, practically as a new commodity, on a different price level."

It is evident that the subscribers were at all times free to fix their own prices according to their own interpretation of market news, according as they judged their own best interest. It is further evident that they were all competing.

2. Stabilization and Constructive Competition.

"The only way to stabilize markets is to stabilize price, and the only way to stabilize price is to make known instantly all the essential facts about supply and demand."

C. S. Duncan, Ph.D., *supra,* 14.

It is a serious charge and arraignment certain officials have brought against the doctrines of stabilization of industry. When fully and properly understood it merits more serious consideration than ridicule and sarcasm.

An effort or tendency to stabilize business through cooperation of competitors in the matter of collection and dissemination of market news, with a view of bringing about more intelligent individual forecasting, and less guess work, in no wise conflicts with the purpose of the anti-trust laws. The severe aspects of the most recent industrial crisis in 1920 and 1921, illustrate the necessity for some remedy to make these periods of business depression less frequent and less disastrous. The rapid expansion following the armistice was accompanied with all those elements that result in an industrial crisis. The

economic waste and human distress which followed are still fresh in the minds of all. Anxiety, poverty, privation go hand and hand with business depressions, caused by lack of equilibrium in industry. No other economic loss can compare with the losses resulting from business extremes. The waste is incalculable and the human suffering enormous. These extremes cannot be eliminated entirely, they are a part and parcel of our system, but it would be a sad commentary upon our laws and industrial system if we cannot at least mitigate their ruinous effects. It would be foolhardy to try to prevent cycles entirely, but it would be worse than foolhardy to shrink from the plain duty of stabilizing business much more than has been done up to the present time. The stabilization of business is the pressing problem of today, and its importance cannot be exaggerated.

The infinite interrelations of modern business demand more enlightenment through adequate statistics, which lead to accurate forecasting by each individual. The dissemination of information is even more necessary in boom times, than during depressed periods. Stabilizing prosperity is essential in order to prevent depression which always follows an excessive rise. That is why the report of the President's Unemployment Committee's report above referred to, is both sound and timely. During the war plant, capacity was enlarged greatly in excess of domestic demands. Production can quickly overtake increased demand. Secretary Hoover, chairman of that committee, says that his committee's report contains neither novelties nor panaceas, but aims to spread the facts about approaching dangers, on the theory that "forewarned is forearmed." THE FIRST CURE FOR OVERPRODUCTION DURING A PERIOD OF PROSPERITY WOULD BE TO MAKE KNOWN TO ALL PRODUCERS JUST HOW MUCH OF EACH COMMODITY HAS BEEN AND IS BEING PRODUCED.

Mr. W. C. Mitchell, in the March, 1920, American Economic Review, made the following comment regarding wide fluctuations in price levels.

> "The United States has maintained the gold standard without serious limitation and has reorganized its banking system on approved lines. Nevertheless we have had price fluctuations almost as violent as those of the greenback period. These fluctuations have caused unmerited suffering to millions of families and have heaped unearned riches upon thousands. They have caused wasteful struggles, encouraged extravagance among some, and created the class of 'new poor.' They have promoted speculation and reduced the efficiency of management and labor. We are poorer in goods, more quarrelsome in spirit, less ready to work because of these fluctuations. All this has happened and is irretrievable. But within a few years fresh changes may happen just as evil in their consequences. This wretched record and this wretched prospect are a grave indictment of our present form of economic organization."

For the protection of conservative property interests and for the proper conservation of life and welfare of labor, it is of the utmost importance that a greater stabilization of prices be attained. It cannot be done unless we can cooperate to the extent of gathering and distributing industrial facts. If remarks like these were made in the Linseed Oil Council, some officials would say that they were made for the purpose of curtailing production and enhancing prices. Yet they in substance are made by government officials and bank reports. Economic works are full of them, and the Bureau's bulletins were of similar purport.

Much of the evidence in this record relates solely to incidental matters of trade practices which redound more to the advantage of the buyers than the sellers, because they make for uniformity regarding customs that have nothing to do with restriction of competition. There must

be some intelligent direction to business. That can only be accomplished through further and still further enlightenment. The belief that production and prices are manipulated by arbitrary factors and devices, ignores simple economic truths. If prices fall below the lower limits of the marginal costs of supply, they cause losses to the marginal producers and drive them out of business. If prices rise above the upper limits set by the marginal group of buyers, the marginal buyers cannot afford to buy, and producers cannot dispose of their goods. That is what happened in 1920, a buyers' strike. Marginal cost of supply determines the minimum below which prices cannot drop for any length of time; marginal demand determines the peak or maximum above which prices cannot rise.

It is impossible to mitigate the rigors of extreme cycles in business unless the risks, uncertainties and misinformed speculation be to a certain extent reduced. A great part of the production in this linseed industry, as in most industries which involve long time processes from the raw material to the finished product, is undertaken many months in advance of the time when the finished product can be placed upon the market. And a great part of the oil is sold for delivery months later. Plans must be laid, production regulated, and orders placed according to the conditions which the producers and buyers expect to encounter at a much later date. If they err in judgment they are placed at a great disadvantage. The readjustment caused by a crisis is always disastrous. The purpose of the statistics is to enable the individuals to be more accurate and stable in their anticipations. Without such guides for the individual, anticipatory production will result in overproduction.

As stated above, there is no claim of curtailment of production in this case, and the Government has so ex-

pressly stated. An approximation toward a normal balance of supply to demand might result from the exercise of intelligent opinions of separate business men in any line of industry, who have access to a common stock of reliable facts. Their opinions will and do vary upon the same state of facts, but in the aggregate and in the end they will not be so widely divergent as to bring on a crisis. But there would be no possibility of their consciously creating an actual shortage for the purpose of elevating the prices. Business stability thus arrived at through enlightenment and individual action, has in it no element of monopolistic action or collusion among the various independent competing concerns. Such methods are very different from those which inevitably and consciously tend toward restraint of trade.

3. Agreement to Report.

It is argued that the agreement to report prices to the Bureau was in effect an agreement to maintain prices.

The idea is this: a subscriber reports to the Bureau that his price to the trade is $1.41 in carload lots. He then, in effect agrees that he will maintain the price of $1.41 until he notifies the Bureau, so that the other subscribers are able to rely on his maintaining that price until the Bureau is notified. But that is not his agreement. His agreement is that as soon as he quotes a different price to the trade he will notify the Bureau. The subscriber agreed "to immediately, and when and as hereafter issued, deposit with the 'bureau,' all published price lists of the undersigned covering raw and boiled linseed oil, cake and meal;

Also to report to the 'bureau' by prepaid telegraph, and further confirm by mail, duplicate all quotations made at variance with above price lists, giving better

terms to the contemplated purchaser than those quoted" (Rec. 175, 176).

When a subscriber had made a new quotation to a prospective customer, then he was to report that fact to the Bureau. First the subscriber made a new quotation to the trade, or to a prospective customer, then he made a report of that fact to the Bureau. There was nothing to prevent the whole contract with a customer being closed at the new price before the report went to the Bureau.

But the counsel for the Government overlook the fundamental proposition that these reports were made to the Bureau for the purpose of giving as full and complete market news as possible. It then furnished to the subscriber something which otherwise he would have to obtain for himself. Consider for a moment these questions. If no one of the subscribers knew the price of any of his competitors would there be any adequate competition? Yet, undoubtedly, under those conditions, there would be a wide variation between the prices of the crushers of linseed oil.

If none of the subscribers knew the price of any of his competitors except what prospective purchasers told him, would there be any adequate competition? Have the subscribers the right to know what their competitors are asking for linseed oil and at what prices and in what amounts and to whom and by whom linseed oil is being sold? Have they the right to know these facts as soon as the facts are facts? Can any one imagine business being carried on without such knowledge? Have men a right to devise adequate methods for securing such knowledge? If so, then why not recognize the Armstrong Bureau for what it claimed to be, a method of promptly securing to business men information which they must have and

which if no one collected for them, they must at great expense collect for themselves?

When a subscriber quoted a new price to the trade, that was a fact, a "*fait accompli.*" Then when that was reported to the Bureau, it was a thing done, as well as of a thing being done. The subscriber did not report to the Bureau "I am going to quote linseed oil at $1.46," but he stated in effect, "I have quoted linseed oil at $1.46, and I am quoting linseed oil at $1.46."

He did not agree to quote at that price for any given time, nor could any subscriber rely on his maintaining that price for even while he was relying on it the price might be changed, and the *reports to the Bureau and from the Bureau to the other subscribers were always after the fact and never before the fact.*

Without the agreement to report price changes as soon as made, the Bureau could not exist. Its information would be always unreliable, and much of the time absolutely false. If a subscriber did not have to report price changes as soon as made, he would always keep his list price above his asking price in order to deceive competitors, and avoid competition. The agreement to report price changes was not for the purpose of maintaining prices, but was for the purpose of maintaining competition. The same reason is back of the endeavors of the Bureau to promptly report price changes to the other subscribers. Only in this way, could they adequately meet the competition of changing prices.

4. Production, Importations, Exportations of Linseed Oil.

Plaintiff's Exhibit No. 9 (Rec. 258-268), and the Government's analysis of the same, leaves much to the imagination. It is inaccurate, misleading and a very errone-

ous statistical balance sheet. It does not show the actual consumption of linseed oil, during periods when the demand and consumption was the heaviest the industry had experienced in its entire history. The imports and exports are listed under "Linseed *or flaxseed.*" They are not segregated.

THE EXHIBIT DOES NOT SHOW THE PRODUCTION OF FLAXSEED IN THIS COUNTRY OR ARGENTINA, NOR DOES IT REVEAL THE PRICES OF FLAXSEED, WHICH IS THE MOST POTENT FACTOR IN THE PRICE OF LINSEED OIL.

Assuming that the amounts of imports and exports are linseed oil, and do not relate to flaxseed, and dealing only with round numbers, millions of pounds, for simplicity, the tables show substantially the following: For the year 1919. First quarter. Produced 88, Excess of imports over exports 1; total 89; less consumed 35; net stocks on hand 54. But the exhibit shows 74 million pounds of stocks on hand, a difference of 20 million pounds.

Second quarter for 1919: Produced 95; net imports 5; total 100; consumed 50; net stocks 50; exhibit shows stocks at the end of this quarter to be 54.

Third quarter for 1919: Produced 129; net imports 1; total 130; consumed 52; net stocks 78; exhibit shows net stocks 52; a discrepancy of 26 million pounds.

Fourth quarter for 1919: Produced 139; net imports total 146; consumed 51; net stocks 95; exhibit shows stocks 81; a difference of 14 million pounds.

By the same method of figuring, for the respective quarters for 1920, there are differences one way or the other of: 1st quarter, 11; 2d, 14; 3d, 9, and the 4th, 24 millions of pounds.

From the foregoing, needless to say, something is wrong, and it is not safe to deduce any deductions from an inadequate data. It is because of such incomplete

and erroneous information, unwarranted assumptions a
frequently invoked. If the actual consumption had be
reported and correct, dependable information as to t
real stocks on hand obtained, it would doubtless ha
revealed amounts from which, when divided among all t
crushers, it would have appeared at once, that each ind
vidual was confronted with a serious threatened shor
age, especially in view of the enormously increasing d
mand, the supply of flaxseed and the soaring prices o
flaxseed.

Defendant's Exhibit No. 16 (Rec. 694), shows, for th
last quarter of 1918, that the price of flaxseed range
from a low of 3.32 to a high of 3.90¾; and betwee
January 1, 1919, and June of that year from 3.23¾ t
5.87½; and during the last quarter of that same yea
from 3.97½ to 5.51; and for the first half of 1920, from
4.09 to 5.53.

Since flaxseed constitutes about seventy-five per cen
of the cost of a gallon of oil, it can readily be seen wha
such wide fluctuations in the price of flaxseed would d
to the price of oil. Every other single item in the cos
of production increased very greatly. That is common
knowledge. Regardless of the amounts imported, ex-
ported, produced and consumed, if the production costs,
replacement costs, went skyrocketing, because of the sup-
ply and demand of flaxseed or any other cause, beyond
the control of the crushers, oil must and did follow simi-
lar trends. To do otherwise would have meant that th
crushers would have been crushed themselves between th
upper and nether millstones.

The theory is that in certain quarters there was n
increase in the supply on hand, although during th
quarter the price was rising. This they argue show
price fixing. They say:

"These statistics indicate that the price of linseed oil was not determined by the law of supply and demand. *While the quantities on hand and the demand undoubtedly had an influence upon the prices,* yet they were manifestly largely controlled by forces other than that law."

Then as if to show the absurdity of their contention, they make this astonishing admission:

"*It is fair to state that this table manifestly does not show the actual consumption of oil.* In the preface to the report of the Department of Commerce of which this table is a part, it is shown that as to some fats and oils, *the entire amounts consumed do not appear because reports from many sources could not be obtained*" (Gov. Brief, p. 140).

In other words, the admission destroys the argument. For if you know the supply but do not know the demand, you cannot estimate price. Both factors must be known, and here it is admitted that consumption is unknown. But it is apparent that consumption is not the same as demand. The demand during a given quarter may be very great, not on account of consumption during that quarter, but for future consumption. For example, a manufacturer of paint may be contracting for a large supply of linseed oil, although his consumption during the period would not be large.

It all goes to show that the twelve inch measuring stick of counsel for the Government is a little too small for the proper measuring of the forces of supply and demand in a great country-wide market, or even in any market.

In other words, their statistics are entirely inadequate for any deduction whatever as to the proper price for linseed oil.

5. Chart Showing Variations in Prices of Flaxseed, Replacement Cost of Oil, and Prices of Linseed Oil.

The above chart is printed and discussed on pages 153-155 of the Government's brief. It does show clearly that the price of linseed oil is influenced by the price of flaxseed, more than any other factor. The only criticism of the chart in this respect is, that the price of linseed oil did not go still higher in August and September of 1919, after it had reached the peaks of 2.10 and 2.20 per gallon.

On page 153 of the plaintiff's brief we find the following:

> "This chart shows that the fluctuations in the prices of flaxseed were far more frequent and violent than were the fluctuations in the prices of linseed oil. In fact the prices of flaxseed varied almost daily, and from week to week the fluctuations often took a wide range."

To expect the price of a finished product, sold to wholesalers and retailers, to a very large extent for future delivery, months in advance, when the principal ingredient is made out of a commodity (flaxseed) the cost of production of which has a very low labor content, and consequently the price of which fluctuates more rapidly than that of a raw material having a high labor content, to bob up and down with the gyrating market of such a raw material, is to utterly ignore the simplest of economic truisms.

Of course the price of flaxseed would vary more rapidly and violently, than would the price of linseed oil, and the price of oil would doubtless change before the price of paint and so on. Changes in the prices of raw materials always antedate those of the finished products, just as wholesale prices go up and down long before retail

prices take similar courses. In 1917 wholesale prices stopped rising and ran along nearly level for some time, before again beginning to go up. Six months later retail prices did the same thing. In 1918 wholesale prices anticipated the armistice, and stopped rising in September and began to fall, but it was not until January that retail prices followed. When they began to go up again in the spring of 1919, the retail prices still lagged behind. The same sequence may be noted again in 1920, for the wholesale prices reached their peak and started down in May, but the retail prices did not reach their peak until July.

In line with these charges leveled at this linseed oil industry, on account of high prices, during 1920 and part of 1921, there was an almost unbroken chorus of complaint in our newspapers and our legislatures because retail prices did not fall as rapidly as wholesale prices. The cause of the lead of the one and the lag of the other, just as in the case of the prices of flaxseed and linseed oil, is to be found in economic law (business conditions) rather than in personal guilt, and it would be well for those who make such complaints to note that prices of finished products, as compared with those of raw materials, were slower and more moderate in their increases, just as they fall with greater deliberation.

The cause for this difference is manifest. Suppose a crusher were a dealer in flaxseed at wholesale, and also ran a retail and wholesale store for the sale of linseed oil. If he received a cablegram announcing an unexpected crop failure of flaxseed in Argentina, he would certainly know that the wholesale price of flaxseed would begin to move upwards within a very few minutes. He would not on that day nor the next increase the wholesale or retail price of oil, for this oil would be made from the flaxseed bought at the old, low levels. Neither would he

at once increase the wages of his employes. The same analogy could be applied to wheat, flour and the bread that is sold over the counter.

The following elementary economic principles satisfactorily explain the chart in question which seems to have led counsel into another ingenious but not sound assumption. (1) Prices of raw material move first and farthest. (2) Wholesale prices move second and farther than retail prices, which move more slowly and less violently. (3) Wage levels change more slowly than prices. (4) Manufactured articles, having a high labor content, change their price levels more slowly than do raw materials, having a low labor content. (5) Salaries change more slowly than wages. (6) Rents change more slowly than prices, wages, or salaries.

Wheat is a commodity in which the price changes from day to day. But the wholesale price of bread may not change in a year's time, sometimes much longer than that.

The principle is the same as that applied to wholesale prices and retail prices. Retail prices change much more slowly than wholesale prices, and especially so on a falling market. When either manufacturers or retail merchants are stocked up with high priced goods during a period of falling prices, they naturally cut prices reluctantly and slowly, in a desire to minimize their losses. It is universal in business, and always has been.

The record shows that linseed oil enters very largely into the manufacture of paint. If the proposition of counsel for the Government is correct, the price of paint should vary every time the price of linseed oil goes up, or down, and that should respond to every change in the price registered in the flaxseed market. Yet Merritt Arthur Richardson, president of the Inland White Lead Company, testifying for the Government, at page 65 of the record, said:

"We did not change the price of lead as frequently as the oil people did, as that makes it too unsettled for our customers. We try to make a price for paint for six months. That is why we buy oil ahead of time, and after we have gone out and bought it, we know how much our paint costs us."

William Hoch, manager of the Paint Department of Sears, Roebuck & Co., testifying for the Government, stated (Rec. 54):

"There was a great fluctuation in the price of linseed oil which I bought. My price for paint has remained substantially at $2.88, during the two years."

F. J. Hurtz, purchasing agent for Bradley & Vrooman, testifying for the Government, page 56, said:

"There is something between 85 and 90 per cent of linseed oil in a gallon of paint. * * *
"I don't think the price of linseed oil ever affects the price of our paint."

It is submitted that the claimed fact, if it is a fact, that the price of linseed oil did not change as rapidly as the price of flaxseed is without merit, and affords no basis for any inference of restraint of trade.

6. Publicity of Reports.

In its organization, in its operations, in its meetings, and in its reports, there was nothing secret about the Armstrong Bureau. It operated openly and frankly, and its information was sent out to those who paid for and made possible its operations; but in this it did not differ from other private news gathering agencies. A charge is made by all of them for their service; otherwise they could not exist. Newspapers, even those advocating communistic doctrine still make a charge to their subscribers. While the Government freely gives out its information, yet it is obtained by cer-

tain departments to a very large extent through trade organizations, through the cooperation of those engaged in the industry, and who pay the expense of the same. As far as people generally are concerned, the Government reports lack immediateness. The Government has not yet been able to put a private wire in to the homes of the citizens, so that every cotton grower can have the information for nothing, and as soon as the Cotton Exchanges.

The news which went into the Bureau with regard to prices had already gone out to the trade—that is to the buyers. So that although the Bureau did not send out the information directly to the buyers, which would be difficult to do practically because of the large number of buyers, some of the buyers had the information before the Bureau had it, and so of course before the subscribers generally. But in the nature of things this information would be sent to the buyers as quickly as possible. When any change is made in the price of oil by any crusher, it has first been made to that crusher's customers. The Bureau then sends it to all the other crushers, who most certainly would instantly get word to their customers. In that way the entire trade becomes advised. When any crusher sold below the other subscribers, it did it to get the business, and it could be depended on to see to it that that fact was as widely known as possible. On the other hand, as soon as it was known that a subscriber had raised its price from $1.60 to $1.65 for example, then beyond any question, those crushers who stayed at the lower level would speedily inform the trade that a certain subscriber had raised the price, but that they were prepared to fill orders at the lower level. Sometimes, if their judgment agreed with that of the subscriber who raised the price, they would raise too, but then all of the subscribers would promptly notify the

trade, that is the buyers. So that as a practical result, all of this market news would go out to the sellers as soon as it would to the subscribers, and the market news would be much more quickly and accurately obtained by the buying public after the Armstrong Bureau went into operation than before. The plan of the Armstrong Bureau was not in any way based on secrecy or the bottling up of information, that is it in no way sought to bring about or maintain an artificial situation.

If this market news filtered through to the buyers more slowly than it was received by the subscribers, then that fact did not bring about any different economic result in kind. The tendency toward a single price at a given time would not operate so freely. But admittedly that tendency operated more freely after the Armstrong Bureau went into operation than it did before. (In fact the Government makes this tendency toward uniformity one of its principal charges). In so far as it hastened this process the Armstrong Bureau quickened and developed trade and commerce. To say that the Armstrong Bureau restrained trade because it did not give away market news to everybody is pure nonsense. One might just as well argue that these crushers of linseed oil were restraining commerce because they failed to give away their oil instead of endeavoring to sell it at a fair profit.

X.

IN VIEW OF THE FACT THAT THE SHERMAN ANTI-TRUST ACT IS ESSENTIALLY A CRIMINAL STATUTE PROOF OF ITS VIOLATION SHOULD BE CLEAR, POSITIVE AND CONVINCING. IT SHOULD NOT BE BASED ON QUESTIONABLE OR DOUBTFUL INFERENCES.

The first two sections of the Sherman Anti-Trust Act makes certain acts crimes. The act provides punishment

for those crimes including imprisonment. The act als
provides that the commission of those crimes may b
enjoined by a proceeding in equity. But even so, th
equity proceeding is essentially a criminal proceedin
and before a court has a right to enjoin, the court mus
determine that a crime has been or is being committed.

In the case of *Northern Securities Company* v. *U. S.*
193 U. S. 197, Mr. Justice Holmes dissenting, said, a
page 401:

> "The statute of which we have to find the mean
> ing, is a criminal statute. The two sections, on whic
> the Government relies, both make certain act
> crimes. That is their immediate purpose and tha
> is what they say. It is vain to insist that this i
> not a criminal proceeding. The words cannot b
> read one way in a suit which is to end in fine and im
> prisonment, and in another way in (one) which i
> seeks an injunction. The construction which is
> adopted in this case must be adopted in one of th
> other sort. I am no friend of artificial interpreta
> tion because, the statute is of one kind rather than
> another, but all agree that before a statute is to be
> taken to punish that which always has been lawful, it
> must express its intent in clear words. So I say we
> must read the words before us as if the question were
> whether two small exporting grocers should go to
> jail."

Even though the foregoing statement is included in the dissenting opinion, it is not at variance with all decisions regarding the interpretation of the statute in this particular.

In *U. S.* v. *Swift et al.* 188 Fed. Rep. 92, at p. 96 (Criminal Prosecution), Judge Carpenter, in a careful opinion sustaining the indictments, and designed to show that prior decisions sustaining injunctive remedies were applicable to the judicial construction of the act as a criminal statute, said:

> The Sherman Act is primarily a criminal statute.
> Its title announces its purpose. * * * Here the

jurisdiction of the equity courts is made dependent upon the criminal sections. If Sections 1, 2, and 3 were repealed by Congress there would be nothing left of the law to which Sections 4 and 7 could apply. It is impossible to give effect to the equity sections without reference being had to the criminal section. It authorizes the processes of the Chancery Court to be used only to prevent the carrying out of that which is declared in the prior sections to be criminal. It follows, therefore, *that unless that which is sought to be enjoined is a violation of the act under one of the preceding sections, in other words, that unless that which is sought to be enjoined is a crime, it cannot be enjoined, because it is only that which is made a crime by the statute which is subject to the equity jurisdiction.*"

Even if the Government should not be required to prove these defendants guilty beyond a reasonable doubt because the form of action is by a bill in equity instead of indictment, nevertheless, it must be remembered that, although it is in form an equity proceeding, it is not in reality a proceeding in equity, but is a statutory proceeding to enforce a criminal act. The charges of the Government's claim are that these defendants conspired to violate, and did violate, a criminal statute. While in this proceeding these defendants are not liable to fine or imprisonment, yet, if the decree of the court be against them, they will be branded as criminals, their business injured. and the Armstrong Bureau would be destroyed. With such an issue at stake, the court, whatever its name, or form, if it is to be a court of justice, must have clear and convincing proof that the law is violated. It has no right to act upon a guess, surmise, or suspicion, and if there is any doubt, it is to be resolved in favor of those accused of the crime.

Business men, in fact every citizen, should be allowed the same presumption of freedom from guilt that is freely accorded to lowest criminals.

In the case of *U. S.* v. *U. S. Steel Corporation et al.*, 251 U. S. 417, the Government claimed that the corporation had kept prices of its products at high and uniform levels. The court, speaking through Mr. Justice McKenna, said (p. 448):

> "The opinion of an editor of a trade journal is adduced, and that of an author and teacher of economics, whose philosophical deductions had, perhaps, fortification from experience as Deputy Commissioner of Corporations, and as an employe in the Bureau of Corporations. His deduction was that when prices are constant through a definite period an artificial influence is indicated; if they vary during such period, it is a consequence of competitive conditions. It has become an aphorism that there is danger of deception in generalities, and in a case of this importance we should have something surer for judgment than speculation, something more than a deduction equivocal in itself, even though the facts it rests on or asserts, were not contradicted."

In the present case, counsel for the Government claim that prices of linseed oil were constant through definite periods and that that proved an artificial influence, that is to say a restraint. In the *Steel* case, the theory had the support of one who might be presumed to have some basis in experience and study for an opinion, but here the counsel for the Government present the same theory without the support of any one except themselves. It may be that their opinion is entitled to great weight in this field as well as in the field of public law, but if so they should appear as unbiased scholars and students of economics, and not as public prosecutors.

XI.

IF THE PLAN OF THE ARMSTRONG BUREAU IN ANY WAY INVOLVED A RESTRAINT OF TRADE, IT WAS AN INCIDENTAL RESTRAINT AND NOT DIRECT AND IMMEDIATE.

In the early case of *United States* v. *E. C. Knight Company,* 156 U. S. 1, the court, speaking through Mr. Chief Justice Fuller, laid down the rule, from which the court has never departed, that to be within the inhibition of the Anti-Trust Act a restraint of commerce must be direct. The court said (p. 17):

> "There was nothing in the proof to indicate any intention to put a restraint upon trade or commerce, and the fact, as we have seen, that trade or commerce might be indirectly affected was not enough to entitle complainants to a decree."

In *United States* v. *Joint Traffic Association,* 171 U. S. 505, at 568, the court said:

> "The effect upon interstate commerce must not be indirect or incidental only. An agreement entered into for the purpose of promoting the legitimate business of an individual or corporation, with no purpose to thereby affect or restrain interstate commerce, and which does not directly restrain such commerce, is not, as we think, covered by the act, although the agreement may indirectly and remotely affect that commerce."

In *Hopkins* v. *United States,* 171 U. S. 578, the court laid down the rule (p. 600):

> "The act of Congress must have a reasonable construction or else there would scarcely be an agreement or contract among business men that could not be said to have, indirectly or remotely, some bearing upon interstate commerce, and possibly to restrain it. We have no idea that the act covers or was intended to cover such kinds of agreements."

See also in this connection—

Anderson v. *United States,* 171 U. S. 604.

In *Addyston Pipe & Steel Co.* v. *United States,* 175 U. S. 211, the court held that an agreement between manufacturers of steel pipe not to bid against each other was unlawful, because its direct and immediate effect was to destroy competition between them and thereby raise prices, and stated (page 244):

> "That when it is seen that the agreement entered into does not directly relate to and act upon and embrace interstate commerce, and that it was executed for another and entirely different purpose, and that it was calculated to attain it, the agreement would be upheld, if its effect upon that commerce was only indirect and incidental."

In the case of *U. S. Fidelity & Guaranty Co. of Baltimore* v. *Commonwealth of Kentucky,* 231 U. S. 394, the Supreme Court held that a tax upon a corporation engaged in the business of inquiring into and reporting upon the credit and standing of persons in the state, was not unconstitutional as a burden upon interstate commerce as applied to a non-resident engaged in selecting and distributing a list of guaranteed attorneys in the United States, and having a representative in the State. The contention was that the service rendered through the representatives of the same kind, acting as agents of merchants engaged in interstate commerce, by furnishing them with information through the mails, or by telegraph or telephone, as a result of which merchandise might be transported in interstate commerce as to preclude the State of Kentucky from imposing a privilege tax upon such business. But this contention the Supreme Court denied.

The information collected and distributed by the Armstrong Bureau was no more closely connected with Inter-

state Commerce than the credit information collected by United States Fidelity & Guaranty Co. of Baltimore.

In the present case the chief purpose of the Bureau was to collect information in regard to the linseed oil business, and to disseminate this information among its subscribers. Its relationship to its subscribers was similar to that of the United States Fidelity and Guaranty Co. to its subscribers.

More than that, the information collected and disseminated was true. It was not "faked" or "edited" or in any way "manufactured." It was information which its subscribers would have to secure from some source or other if they were to continue in business. The Bureau was a permanent organization. It was not organized merely for a day or a month or a year.

If the publication of the information tended to increase prices during an early part of the period during which the Bureau operated (which we do not admit), still that was merely incidental to a peculiar "adventitious" situation. It was a period of rising prices for all commodities, and in every line of business.

But, just as truly prices fell during the latter part of the period of the Bureau's operations.

On October 1, 1918, about the time the Bureau began operations, the price of linseed oil was from $1.79 to $1.89 per gallon for prompt delivery. After a time the price fell as low as $1.43, then the price (like that of all other commodities) rose until it reached a general price of $2.20; then the price fell; on June 28, 1920, it was selling from $1.58 to $1.69 (Rec. 184-189).

No one can contend that the publication of market news will always tend to bring about higher prices, because every one knows that such information may and just as often does have an exactly opposite effect. Mar-

ket news of the offering of commodities at lower prices tends to bring about lower prices, and everyone knows it. When men want to depress the prices of stocks, for example, they begin to offer them for sale in large quantities and at lower prices.

Unless higher prices necessarily and always result from the operation of a news gathering and news distributing agency, such as the Armstrong Bureau, then if higher prices result at some particular time, such a result is incidental and not necessary and direct because, as in this case just as often lower prices will result. As this court said in *U. S.* v. *U. S. Steel Co.*, 251 U. S. 417, 442:

> "THE CONTENTIONS OF THE CASE, THEREFORE, MUST BE JUDGED BY THE REQUIREMENTS OF THE LAW, NOT BY ACCIDENTAL OR ADVENTITIOUS CIRCUMSTANCES." (Caps ours.)

The great commercial exchanges of the country have all formulated elaborated rules for their members as to their trading. They establish certain standards of commission rates. Their rules forbid members trading with expelled or suspended members. They limit the hours of public trading. The rules often forbid public trading in the stocks or commodities sold on the exchange at any place other than the exchange itself and within the hours specifically provided. Even at the present time the Secretary of Agriculture is engaged in adjusting the rates of commission to be charged upon the various live stock exchanges of the country. That the Secretary does this by virtue of a statute is not material. The statute in effect recognizes the necessities of the situation. In the case of *Anderson* v. *United States*, 171 U. S. 604, this court held that a rule of a livestock exchange that its members should not recognize any yard trader who was not also a member of the exchange was not invalid as a restraint of trade. It has also been held by this court that restrictions

on sending prepaid telegrams or telephone messages, made by a by-law of a live stock exchange are not void under the Sherman Anti-Trust Act as in restraint of interstate commerce, where these regulations are merely for the regulation of the business of the members.

Hopkins v. *U. S.*, 171 U. S. 578.

In *State* v. *Duluth Board of Trade*, 107 Minn. 506; 121 N. W. 395, it was held that a rule of a board of trade which provides that all members of the board shall charge a uniform and determined rate of commission for selling grain for non-members, and imposes penalties for the violation of such rule did not violate the Minnesota Anti-Trust Statute as being in restraint of trade or a limitation on competition. The validity of such rules was upheld by this court in *Board of Trade of the City of Chicago* v. *United States*, 246 U. S. 231.

In this case it was held that a rule of the Board of Trade prohibiting members from purchasing or offering to purchase during the period between the close of "the call" and the opening of the session on the next business day, any wheat, corn, oats or rye "to arrive" at a price other than the closing bid at the call, did not constitute an unlawful restraint of trade or commerce, and that it merely regulated and thereby tended to promote commerce. As Mr. Justice Brandeis said in that case:

> "Every board of trade and nearly every trade organization imposes some restraint upon the conduct of business by its members."

In other words, the propriety and legality of such rules and regulations reasonably made is upheld.

In the case of *Swift & Co. et al.* v. *United States*, 196 U. S. 375, Swift & Co. and other packing concerns were charged with having entered into an illegal combination in an attempt to monopolize commerce in fresh meats.

charging them, among a great many other things, with having combined to make uniform charges for cartage for the delivery of meats sold to dealers and consumers in the markets throughout the states, etc., shipped to them by the defendants through the defendants' agents at the markets, when no charges would have been made but for the combination.

The defendants were enjoined from proceeding with the combination and forbidden to do a great many things, some of which were admittedly lawful when disassociated from the unlawful purpose of monopoly. The decree of the lower court after enjoining various acts calculated to carry the purpose of monopoly and restraint of trade into effect contained the following:

> "But nothing herein shall be construed to prohibit the said defendants from agreeing upon charges for cartage and delivery, and other *incidentals* connected with local sales, where such charges are not calculated to have any effect upon competition in the sales and delivery of meats; nor from establishing and maintaining rules for the giving of credit to dealers where such rules in good faith are calculated solely to protect the defendants against dishonest or irresponsible dealers, *nor from curtailing the quantity of meats shipped to a given market where the* purpose of such arrangement in good faith is to prevent the over-accumulation of meats as perishable articles in such markets." (Italics ours.)

There was a slight modification of the decree by this court but the section cited was not changed.

Now, if the packing concerns whom the court found were endeavoring to create a monopoly and restrain trade could lawfully agree upon uniform charges for cartage and delivery and other incidents connected with local sales and could establish uniform rules for the giving of credit where the same was done in good faith and could curtail the quantity of meats shipped to a given market

for the purpose of preventing an over-accumulation of meats as perishable articles in such markets it would seem that it was right and proper for other business men to establish uniform trade practices of an incidental character.

XII.

THE ARMSTRONG BUREAU IS NOT WITHIN THE TERMS OF THE DECISION OF THE SUPREME COURT IN THE HARDWOOD LUMBER CASE.

In the case of the *American Column & Lumber Company* v. *United States,* commonly called the *Hardwood Lumber* case, decided December 19, 1921, the Supreme Court handed down a decision as to an association, which counsel for the Government claim is decisive of this case. In that case there was a very large association of hardwood manufacturers. The association, however, not only collected information with regard to the hardwood industry, but all of this information was cleared through a "Manager of Statistics" who in the opinion of the court, endeavored to interpret the information to the members, urging upon them higher prices and a limiting of production.

Numerous meetings of the members were held with the same purpose in mind as the majority of the court viewed the evidence. Prices rose rapidly, and this court considered the evidence showed that that association was not merely an agency for the collecting and clearing of market news, but that the purpose and intent of that organization was higher prices and a limiting of production, in other words a restraint of trade. Many statements of the Manager of Statistics as well as of the members tending to show such a purpose, are quoted in the opinion, and the members were continually giving to each

other their views not only of market conditions, but also as to the future course of the market.

All of this is absent from the present case. There was no effort at market interpretation, either by Mr. Armstrong or by the subscribers. The information sent out was of facts. Opinions, guesses, prophecies and interpretations had no part in the Bureau's operation. There was no limit placed upon either prices or competition. Prices went up, but they also went down, and in several instances faster than they went up. There is no evidence of any intent other than to promptly secure market news.

In his opinion, Mr. Justice Clark states that genuine competitors do not give minute details of their business to their rivals, "and they do not submit the details of their business to the analysis of an expert, jointly employed, and obtain from him a 'harmonized' estimate of the market as it is, and in his specially and confidentially informed judgment, it promises to be."

The latter is of course true, but we feel that we have shown that in the great size of modern markets, much more cooperation in securing news of market conditions is necessary than obtained when business rivals were for the most part small local concerns on opposite sides of the same street in a small city or town, and each subjected to the constant scrutiny of the other. Under those conditions the statement may be correct. But in the marketing of a commodity, in a market countrywide in extent, a great deal more is needed, and that explains the great development of market news agencies both public and private, already described.

It is respectfully submitted that the decision in the *Hardwood Lumber* case is not applicable here.

XIII.

IF THE PLAN OR OPERATIONS OF THE ARMSTRONG BUREAU IN ANY WAY INVOLVED A RESTRAINT OF TRADE, IT WAS NOT AN UNDUE OR AN UNREASONABLE RESTRAINT OF TRADE.

In the cases of *Standard Oil Co.* v. *United States*, 221 U. S. 1, and *United States* v. *American Tobacco Co.*, 221 U. S. 106, the Supreme Court entered upon what was regarded as a basic reinterpretation of the Anti-Trust Act. The Sherman Anti-Trust Act is an expression by the Congress of a national policy. As it was previously interpreted, that policy would have excluded almost every form of consolidation in industry or restraint of trade, wholly irrespective of the economic conditions upon which such consolidation or restraint might have been founded. The evident purpose of the Supreme Court in the *Standard Oil* and *Tobacco* cases was to read into that Act a policy more liberal to the modern trend of industry. Unless that was the court's purpose no purpose worth the voluminous pages devoted to the opinion existed at all.

BUT THE COURT EVIDENTLY FELT (JUSTICE HARLAN DISSENTING) THAT SOMETHING MORE WAS DUE TO THE BUSINESS OF THE COUNTRY THAN MERELY TO DECIDE THOSE CASES ON THEIR CONCRETE FACTS. It was because of this, undoubtedly, that the court entered on a basic reinterpretation of what the Sherman Act meant; as the result of which, setting aside "potentiality" to do injury, as the basic test, the court replaced it with the "rule of reason," as to what constituted restraint of trade. Recognizing that the term "restraint" in connection with trade was not a word of mere description—"restraint" in its pure literary sense—but was a concrete noun in the law, the court went to contracts in restraint of trade at common

law for light as to exactly what that noun stood for and meant in the Sherman Act. And it was largely because at common law, the noun restraint of trade meant only unreasonable or undue restraint, that the court replaced mere potentiality to do injury with the "rule of reason" as the test.

Prior to the "rule of reason," what was overlooked was that purely artificial barriers in the long run would be not only uneconomic, but would be injurious to the public; that the economic current—industrial evolution and development, which had set in, subject to such limitations as would keep it from overflowing the banks of safety, was a natural and inevitable current; that great changes in industry have taken place; the unit of industry had grown from the single individual and his few assistants into masses of men, organized into industrial companies; market news everywhere collected and distributed.

It took years for this view to become established. But when it did become recognized, it was reflected in the *Standard Oil* case (221 U. S. 1) and the *Tobacco* case (221 U. S. 106), decided 12 years after the *Trans-Missouri* case. The presumption that the motive and intent were necessarily to arbitrarily raise prices to the public, gave way in the *Standard Oil* and *Tobacco* cases to the inquiry: Was such the motive and intent of the specific transactions in question? In a word, the Supreme Court changed from mere "potentiality" to do injury to the public as the test of whether the transactions were lawful or not, to the "Rule of Reason," that at common law had governed the question of whether the restraint of trade resulting was, all things considered, one harmful to the public or not.

In the case of *Nash* v. *United States*, 229 U. S. 373, the court formulated a negative definition or test of what is meant by the "rule of reason," as follows:

"Only such contracts and combinations are within the act as *by reason of intent* or *the inherent nature of the contemplated acts prejudice the public interest by unduly restricting competition or obstructing the course of trade.*" (Italics ours.)

From this view the court has not departed, but the view has been subsequently upheld in the case of *United States* v. *U. S. Steel Co.*, 251 U. S. 417, and other cases.

Under the test laid down in these cases, the court must consider the "intent" and the "inherent nature" of the acts. For that reason the court must also consider, and has considered, the economic changes in our developing society. The acts to be considered are those of men carrying on business and industry. They are men who are buying, selling, manufacturing, transporting. Their intent can only be understood in the light of what they are doing. Are their actions reasonable? Are they beneficial or harmful to society? These questions can be answered only after a careful inquiry as to the needs and development of business.

For example, the reasonableness from the standpoint of society of such a great consolidation as the United States Steel Co. lies in the steel business itself, in the need for an integration of such business, of operating it as a unit with one corporation, mining and transporting the ore, operating the blast furnaces, converting the pig iron into steel and then fabricating the steel into products ready for commercial use. To do this of necessity requires a vast organization, all of which was apparent to this court when it considered that great case.

In the *Steel* case the court found that the underlying economic considerations justified the purpose and intent of that organization. BUT THE COURT NOT ONLY DECIDED THE STEEL CASE ON ITS FACTS, IT LAID DOWN A RULE OF CONDUCT FOR BUSINESS IN GENERAL.

The need of Society for the most economical and
ficient process of making steel and its products brou
about such great corporations. The reason then for th
existence, in other words, their reasonableness, is fou
in the development of the industry itself, and not in boo
of law.

For that reason, in applying the Sherman Anti-Tru
Act, the court must with wisdom and with broad visi
look out upon a vast and rapidly developing society.
must consider the economic structure of that society.
must consider the reasons for the development of ne
industrial agencies in order to decide what is the inte
of men, what is the inherent nature of their acts, a
whether those acts are beneficial or prejudicial to t
public.

In this case in an endeavor to determine the real inte
of these men, we have endeavored to show the deep u
derlying economic need of that which they sought to s
cure. We have tried to show what was their actual "i
tent." We have endeavored to show the "inherent n
ture" of their actions, and that their actions were in th
public interest and not adverse to it. Men need and mus
have market news. They always will need it. Prices o
competitors constitute one of the most important ele
ments of market news, and knowledge of them is abso
lutely essential to competition.

The great development of transportation has so tre
mendously enlarged our markets that newer, better, mor
accurate, more immediate methods of securing marke
news are essential. This agency called the Armstrong
Bureau was in fact what it claimed to be, a modern
method or agency for the better collecting and distribut
ing of market news. The rapid spread of this marke
news to the manufacturers directly, but rapidly, if indi

rectly, to the buyers tended to bring prices more quickly into proper adjustment to supply and demand. The Bureau did not endeavor to build up practices inimical to the public interest, but rather to develop the business in the interests of all.

Applying the rule of this court, how then can it be held that the acts of these defendants constituted an unreasonable restraint, or even any restraint of trade or commerce?

It is submitted that there was no unlawful purpose and no unlawful acts and that the decision of the Court below should be affirmed.

The need of business, of the nation as a whole with regard to business is not ignorance. Ignorance of the facts may for a time prevent prices from rising, but it is to ignorance that we owe over-production and under-production.

It is to ignorance that we owe those periodic financial storms, which in the midst of seeming prosperity sweep across the land, destroying great financial institutions, throwing men by the thousands out of employment, leaving financial wreckage and misery in their wake.

In business, as well as in every line of human endeavor, the need is for knowledge, for knowledge of all the facts, not that men may evade law but that they may obey it. For only out of a fullness of knowledge can men ever hope to act with wisdom.

Respectfully submitted,

Wm. J. Matthews,
Hugh T. Martin,
as Amici Curiae.